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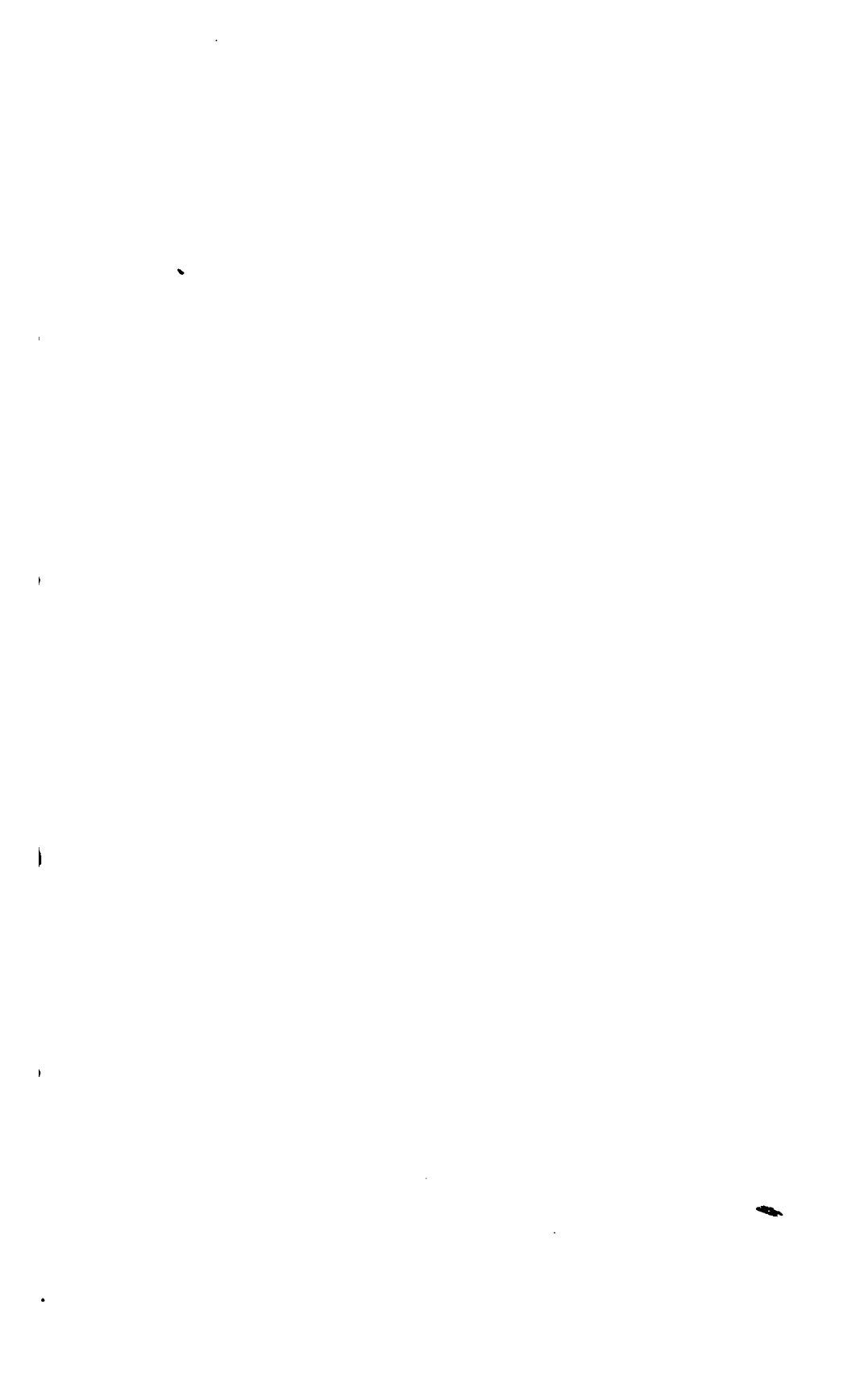
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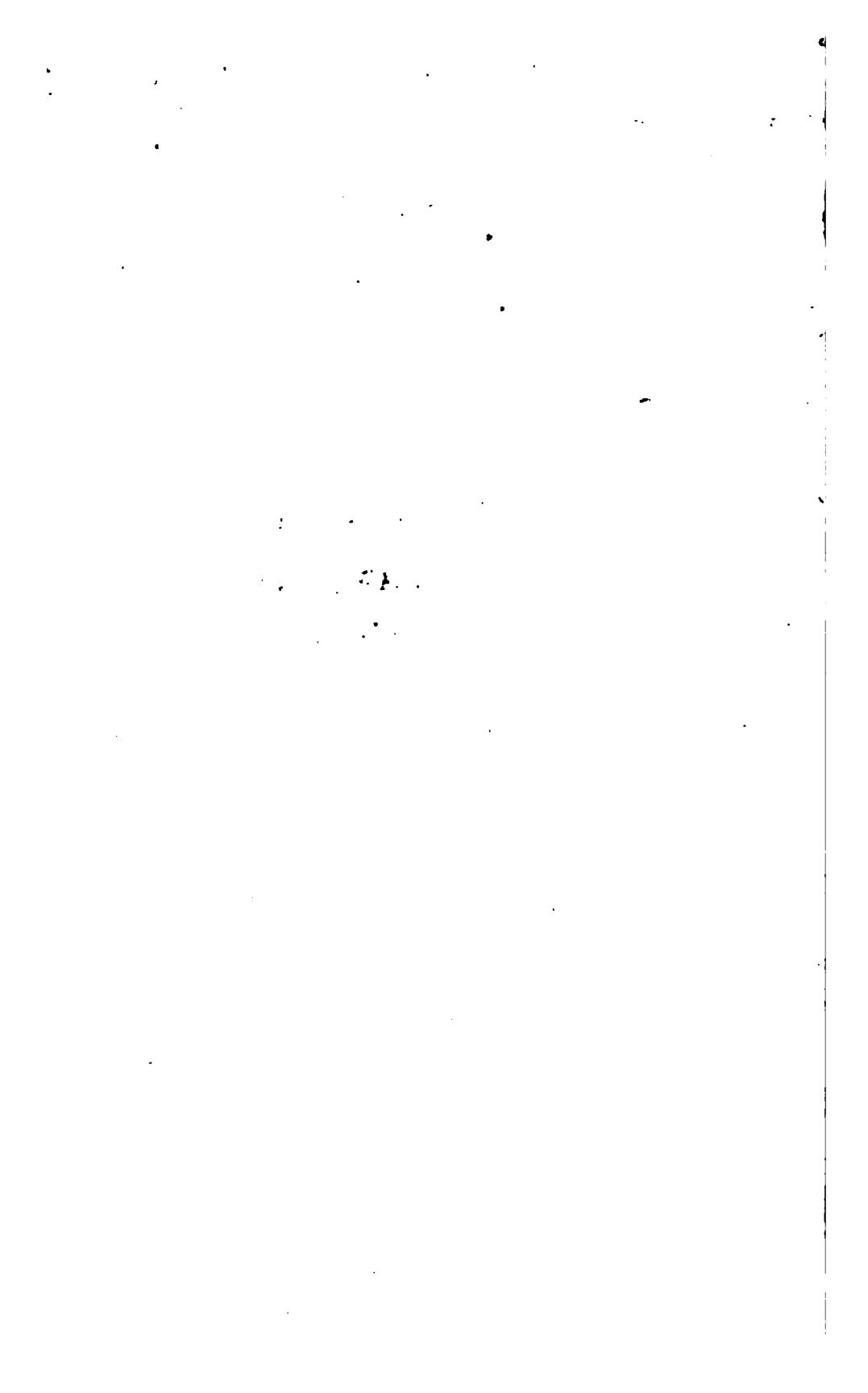
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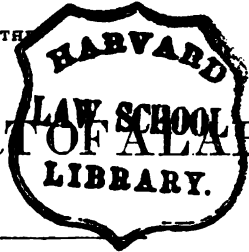
REPORTS

CASES AT LAW AND IN EQUITY,

ARGUED AND ADJUDGED

IN THE

SUPREME COURT OF ALABAMA;



BY

BENJAMIN F. PORTER.

VOL. VIII.

CONTAINING DECISIONS OF

June and January Terms, 1839.

TUSKALOOSA:

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1839.

[Entered, according to the act of Congress, in the year 1839, by BEN-
JAMIN F. PORTER, in the Clerk's Office of the District Court of Alabama,
for the Middle District.]

OFFICERS OF THE SUPREME COURT,

During the time of these Decisions.

Hon. HENRY W. COLLIER, Chief Justice.

Hon. HENRY GOLDTHWAITE, } Associate Justices.
Hon. JOHN J. ORMOND, }

LINCOLN CLARK, Esq. Attorney General.

BENJAMIN F. PORTER, Reporter.

JAMES B. WALLACE, Esq. Clerk.

RULES

Adopted at the January Term, 1838, of the Supreme Court.

"It is ordered by this Court, That the Rules of Court collected and published in the fifth volume of Stewart & Porter's Reports, and as there respectively numbered and arranged--be, and the same are hereby adopted as Rules of Practice in the Supreme, Circuit, and County Courts of the State of Alabama.

"As the practice of the Court, in relation to the filing of transcripts, and the setting aside of judgments rendered on certificates and citations, seems to be but imperfectly understood, the Court will state, for the information of the Bar, the Rules, which will hereafter be rigidly adhered to:

1st. If the transcript of the record is not delivered to the Clerk, and errors assigned within the first three days of the term,—the defendant in error is entitled, at any time before the record is filed, and the errors assigned, to his judgment of affirmance, on production of the proper certificate or citation.

2d. Whenever a judgment shall be taken before the call of the Division, to which the case properly belongs, it will be deemed a sufficient cause to reinstate the case, and to set aside the judgment, if the transcript is filed at any time before the first motion day, after the call of the Division.

3d. In all other cases, where a motion is submitted to set aside a judgment rendered on certificate or citation, affidavits must be produced, shewing satisfactory reasons why the transcript was not filed within the three first days after the call of the Division to which the case belongs. If the transcript offered is defective, the affidavits must show, either that application has been made for a correct transcript, or that there was not sufficient time after the defect was discovered, to procure one before the adjournment of the Court. And, in either event, the deficient matter must be stated with sufficient certainty, to enable the defendant in error to admit the existence of the same, and to proceed as if the record was complete.

GENERAL RULE.

Ordered by the Court, In all cases which shall be held under advisement, it shall be the duty of the Clerk to furnish two copies of the record, or such parts thereof, as may be required by the Court, and that the costs of the same be taxed in the bill of costs.

GENERAL RULE,

Adopted at the January Term, 1839, of the Supreme Court.

Ordered, That in all cases where writs of error, or appeals, shall have been allowed, returnable to this Court, if at the proper return term, no proceedings are had in the cause; and the same be neither affirmed, reversed, dismissed nor continued, the defendant in error, or appellee, shall be entitled to proceed to execution in the court below, as if no writ of error or appeal had been allowed, upon filing with the clerk below, the certificate of the clerk of this court, that no proceedings have been had

in such cause at the return term. And the clerk of this court shall issue such certificate, on the application of any party requiring the same, certifying that no proceedings have been had in such cause as the applicant shall name, when such is the fact: *Provided*, That where such certificate shall have been applied for and issued from this court, no affirmance on certificate, from the court below, at any after term, shall be allowed; unless the certificate of no proceedings obtained from this court, be returned with an affidavit that the same has not been used, or other satisfactory evidence thereof.

GENERAL RULES,

Adopted at the June Term, 1839, of the Supreme Court.

This Court has hitherto been very indulgent in admitting to its Bar applicants for license. That none may hereafter present himself, for examination, who is not well skilled in his profession, the Court deems it proper to declare, that in future, examinations conducted under its eye, will be thorough, and well calculated to test the extent of the applicant's professional attainments; and where these are defective, the Court will not hesitate to withhold a license.

Ordered, That in Chancery causes, either party desiring to take the evidence of witnesses, may do so, as now provided, by deposition; or may take the same by filing interrogatories with the Register, or serving a copy on the adverse party, and giving ten days previous notice of the time when the commission will issue, so that cross-interrogatories may be filed: *Provided*, That where there has been no cross-examination, or where the evidence shall have been taken upon interrogatories, and cross-interrogatories, the opposite party shall have the right to a commission to examine again the said witness by deposition, at his own costs, —ten days notice of the time and place being given to the adverse party.

Ordered, That from henceforth, in every action of ejectment, the defendant shall specify in the consent rule, for what premises he intends to defend, and shall consent in such rule, to confess upon the trial, that the defendant, (if he defends as tenant, or in case he defends as landlord, that his tenant,) was, at the time of the service of the declaration, in possession of such premises, and that if upon the trial, the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed.

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REPORTS
OF
CASES ARGUED AND DETERMINED
AT
JUNE TERM, 1838.

HAGAN, et al. vs. CAMPBELL AND CLEVELAND.

1. The rights of riparian proprietors, depend upon the fact, whether the land is bounded by a river where the tide ebbs and flows : or whether it lies along a stream above tide water.
2. In the first case, the right of the owner to the soil, at common law, extends to high water mark, only.
3. The shore below the common tide, belongs to the public : though by grant, it may become vested in the citizen.
4. The rule, that a country bounded by a river, extends to the point of low water, *it seems*, does not apply to the case of a grant by the public, to an individual.
5. At common law, the grantee of lands, (from government,) bounded on tide water, is not allowed to extend his riparian rights beyond ordinary high water mark :—such grants are construed favorably to the grantor, as a trustee for the public ; and no alienation will be presumed, not clearly expressed.
6. Riparian proprietors are entitled to all accessions made, to the lands granted, either by the retreating of the river from its

Hagan, et al. *vs.* Campbell and Cleaveland.

former limits ; or by the slow and secret deposit of sand, or other substances.

7. The beds of navigable streams, as well as the sea, are the property of the public : and if, by the instantaneous casting up of sand, or other substances, the water is thrown back, and an addition is made to the land—the public may claim the accession.
8. *Necus*, if the accession be slow and secret, when it becomes the property of the owner of the adjacent lands.
9. Where the term “ river,” is used in a grant, as a boundary—high, or low, water mark must be intended—not a middle point.
10. A plat or plan of survey may be referred to in a grant, and become part of it ;—showing the proper lines, and ascertaining the locality.
11. Where a line is described in a grant, as running towards one of the cardinal points, it must run directly in the course, unless controlled by some object.
12. And where the distance marked out in a plat, can not be included by allowing the lines to deviate, the grant which refers to the plat, must be construed to mean, that the lines shall be extended without a variation of course.
13. Ignorance of *fact* by a grantor, in regard to assertions in a grant, describing undeserved merit to the grantee, will not control the language of the grant, or limit its operation in favor of one, not claiming under a subsequent grant from the same source.
14. Where, in a grant of lands, bounded by a river, a free passage or road is reserved,—such reservation does not prevent the freehold of all the lands embraced in the grant, from vesting in the grantee ; or limit his riparian rights :—the use of the road only is reserved.
15. *It seems*, that where accretion is made impracticable, without the authority of government, by the labor of a third person,—excluding the water from its former limits,—such third

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person is a trespasser, and can derive no profit from his labor : In such case, his labor inures to the benefit of the riparian proprietor.

16. The grant made by the British government, in seventeen hundred and sixty-seven, to William Richardson, of a certain tract of land in the district of Mobile, on the west side of the river Mobile, conferred on the grantee, in that grant, a title to high water mark, only.
17. But the confirmation of that grant to John Forbes & Co. in eighteen hundred and seven, conveyed to the grantee, *all* the lands lying east of the original tract, to the channel of the river.
18. And to embrace *all* the intervening soil, the north and south lines of the original tract,—held, properly to run, without variation of course, from high water mark, to the margin of the channel.
19. By these grants, and each of them, there was conferred upon the grantees, or their assignees, the right to the gradual increase of soil by the receding of the river.
20. Whether one, who does not own lands, adjacent to a river, where the tide ebbs and flows, may, for the benefit of commerce, erect a wharf or other improvement, between high and low water mark, *quere*.
21. Though it is clear, no part of such erection can rest on the land of another person, nor can the latter be excluded from the use of the water, or be denied, his riparian rights.

This was an action of trespass to try title, prosecuted by the plaintiffs in error, in the Circuit court of Mobile county; and tried before *Harris, J.* The plea was, not guilty; and issue being joined, a verdict was rendered in favor of the defendants.

From a bill of exceptions taken at the trial, it appeared that the plaintiffs gave in evidence to the jury, a grant and survey, (a copy of which accompanied the bill,) and

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proved that the same had been confirmed by an act of Congress, of the third of May, eighteen hundred and nineteen, and deduced title to themselves by mean conveyances under the grant. It was proved that the defendants had, before the commencement of the action, built a wharf upon the ground, for the recovery of which, the same was brought, and at the institution of the suit, held the possession. It was also shewn, that at the date of the grant, the ground occupied by the defendants was covered with the water of the river or bay of Mobile;—whether the ground ever had been uncovered by water, was not clearly shown, inasmuch as the evidence was contradictory. Evidence was adduced to show that John Forbes & Co. the original grantees, had reclaimed, by ditching and otherwise, a portion of the land originally covered with water, but it did not show that their reclamations extended to the wharf and land in possession of the defendants. Evidence was offered by the plaintiffs, tending to show that the southern boundary of the tract embraced by the grant, if extended to the channel of the river Mobile, in the same direction in which it strikes the water, would include the land and wharf occupied by the defendants, but evidence was given by the defendants, showing that the wharf and land sued for, lay below a straight line drawn from the point where the southern line struck the river at high-water mark and the channel of the river, and if a line was run from that point at high-water mark, directly to the channel, the land in controversy would not be embraced.

“The court instructed the jury, that by the terms of

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the grant, the eastern boundary of the tract is the river. Its termination is a question of law. A grant extending to the river, where the tide ebbs and flows, terminates at high-water mark, unless by its terms, it be extended further. The land between high and low-water mark, that is, between the flow and ebb of the tide, belongs to the sovereign, and does not pass by a grant, unless specially given. Such lands as you may find to have been drained by John Forbes & Co., and to have been reclaimed, passed by the grant. If, from the evidence, you believe that the land for which this suit was brought, was at the date of the grant covered by the waters of the river or bay of Mobile, and that it was not subsequently reclaimed by the plaintiffs, nor those under whom they claimed, and that by the terms of the grant, it was not extended further than to the river Mobile; then it is the opinion of the court, that the plaintiffs have no right to recover the premises in question. The court instructed the jury, that the land lying between high and low-water mark, that is, between the ebb and flow of the tide, did not pass by the grant under which the plaintiffs claim, but that if the land, which, at the date of the grant, lay between high and low-water mark, that is, between the ebb and flow of the tide, had been reclaimed by the grantees, so that the water of the said river Mobile had been excluded from it, in that case, the plaintiffs might recover the land thus reclaimed, by virtue of the grant." To all which, the plaintiffs excepted, &c.

The grant referred to, in the bill of exceptions, was dated at Pensacola, the twenty-fifth day of September, eighteen hundred and seven, and made by the Intendant

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of the Province of West Florida, to John Forbes & Co. By this grant, it was shown that the British government, in seventeen hundred and sixty-seven, granted to William Richardson, a tract of land situate in the District of Mobile, on the west side of the river Mobile. That in seventeen hundred and seventy-four, Pantan, Leslie & Co. purchased of William Richardson, the tract embraced by the British grant, and that John Forbes, (a partner of the house of Pantan, Leslie & Co., then continued under the firm of John Forbes & Co.) by his memorial to the tribunal of the Intendancy of West Florida, asked a confirmation of his title. The grant, after reciting the reference of the memorial and its accompanying documents, to the appropriate officers of the Spanish government, and their action thereupon, proceeded as follows:

“It is therefore declared that this house, John Forbes & Co. should be protected, as by the present decree they are protected, in the possession of the said tract of land, so that in no time to come they can be molested or disturbed in their possession of the same, on account of its being royal domain; with which intention, the corresponding title should be issued to them in the ordinary form, and consequently, the “plat” or figurative plan made by Don Josef Collins, the assistant surveyor, to be corrected, as is done by Don Vincente Sebastian Pintado, the surveyor-general of this province, in the copy which he has made of it, with the certificate which follows; by which it appears that the two hundred and sixty-three English acres, reduced to the geodetic measure of this province, compose three hundred and ten arpents, seventy-seven and one-eighth perches of Paris, consisting

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of eighteen lineal perch of said city, and one hundred superficial perches to the arpent, superficial measure, according to the received custom of these provinces; and by the process of survey made the second of May, eighteen hundred and two, by said Collins, it is shewn that the tract of land in question is situate in the district of Mobile, on the west side of the river, a quarter of a league, more or less, to the north of the fort, and terminated by the bank of said river on the east side, and bounded on the north by lands of Jeremiah Terry, said now to be royal domain, on the south by vacant lands, and a lot belonging to said house, (John Forbes & Co.) and according to information on the west by lands of G. Fisher and others, which are said to belong to the royal domain; and although in the foregoing plan, copied from the original made by Don Josef Collins, there is an error in the reduction of acres into arpents, supposing two hundred and eighty of the last to be equal to two hundred and sixty-three of the first; as also an error in the superficies of the trapezium, which figure said land represents; which, according to its dimensions, contains two hundred and eighty-seven arpents. Nevertheless, it must always be understood, in order that it may never operate to the prejudice of the party interested, that the said two hundred and sixty-three English acres, are equal to the three hundred and ten arpents seventy seven and one-eighth perches aforesaid, as calculated by the surveyor-general; and the distance, in the plat marked out, as being from the river to the limits (east) of the land, and left unsurveyed at that period, being impassable, has since been rendered useful,

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by the owners having ditched and drained the same, and which they are to receive in compensation for the above mentioned error ; with the reserve, however, of leaving a free passage on the bank of the river, without altering the figure of said tract on the other side. Whereupon, exercising the power which the King, our Lord, (God preserve him,) has conferred on me in his royal name, I confirm and ratify, to the before mentioned John Forbes & Co., the possession of the three hundred and ten arpents and seventy-seven perches and one-eighth of land, which are superficial, and contained in the plat, number one thousand eight hundred and nine, with the correction made by the surveyor-general, in order that they may, as their own property, possess, sell, or dispose of the same, at their own free will and pleasure, (provided it does not interfere with the claims of a third party,) with the condition that they have to observe and comply with the land regulations made and published by this Intendancy, on the seventeenth of July, seventeen hundred and ninety-nine, or as far as it relates to the local situation and quality of the land. In testimony, &c."

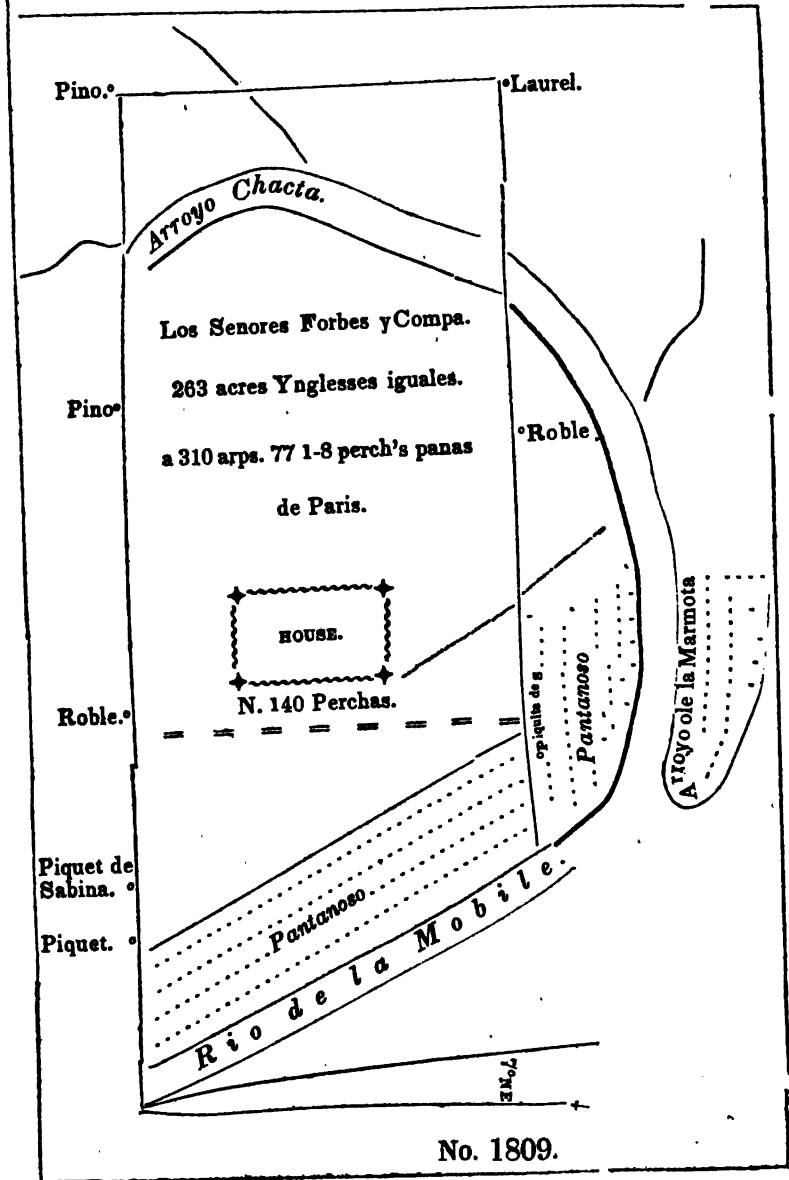
The copy of the survey corresponded with that described in the grant, both as to its number, and the figure of the tract. On it were traced lines, shewing the eastern boundary of the British grant, and from the points where the northern and southern lines strike this boundary, they were continued without deflection, to the channel of the river. And the marsh or flat lying between the channel and the high water mark in seventeen hundred and sixty-seven, was clearly described in the plat.

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[In order to elucidate the case, the Reporter has added a copy of the plat, taken from the Spanish grant, made part of the bill of exceptions.

By act of Congress of 1819, all claims to land, founded on complete grants from the Spanish government, reported to the Secretary of the Treasury by the commissioners from the districts east and west of Pearl river, &c. were recognised and declared valid—(See 3 Story's U. S. Laws, 1748, s. 1, 2.]

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Hopkins, for plaintiffs in error.

Thornton, contra.

Hopkins, for plaintiffs in error, relied on the following points:

1. That the Spanish grant made low-water mark the eastern boundary of the tract—(Co. Litt. Tit. Confirmation, Lib. 3 ch. 9, sec. 515, note 1, page 295; and sec. 521, note 1, page 297; 6 Cowen, 281; 4 Com. Dig. (E. 12) 546, and (G. 4) 54.

2. That the effect of the direction in the grant, to preserve the figure of the tract, is to continue the northern and southern lines to the channel of the river, in the same direction, in which they run to the high-water mark—(1 John. 156; 5 Wheat. 375; 6 Cranch, 237.

3. If the eastern limit of the tract had not been changed by the Spanish grant, the grantee would have a right by accretion, to all the land which might be left, below the original high-water mark, and above what might become at any time the high-water mark, by a change of the high and low-water marks; but the right, to such accretion is merged by the Spanish grant, into the right of the sovereign, to all the land there may be at any time above what may be low-water mark—(10 Peters' R. 662, 717, 721.)

4. If there had been a junior grant to the river, the effect of which, would make high-water mark the eastern boundary, a claimant under it could not, under any circumstances, acquire by accretion, any of the land between high and low-water marks, which lay within the previous grant to Forbes & Co., because such land had

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been previously granted, before the junior grant was made, and consequently, before the title on which the right of accretion depends, was conveyed to the junior grantee. A government may grant to low-water mark; and if such a grant be made, it is a grant of every thing which a government is capable of granting; and the right of accretion upon a junior grant in a direction to interfere with the previous absolute grant of the same land, cannot be conferred. The government could not, by express terms, give the land between high and low-water marks, to a junior grantee, which had been previously granted to another, and such land can never be acquired by a junior grantee, in virtue of the right of accretion.

5. After a grant to such a river, the sovereign cannot grant the land between high and low-water marks to a third person, as such a second grant would destroy the right of accretion, and deprive the first grantee of his river front. But in this case, a junior grantee of land bounded by the river, might know, and had constructive notice of the fact, that he could never acquire by accretion any thing in a direction, to interfere with the land between high and low-water marks, previously granted to Forbes & Co.

Thornton, for defendants in error. The whole question, in this case, depends on the construction of the grant to the plaintiffs, as to the extent and direction of the southern boundary line. The question of fact is settled by the bill of exceptions, that the *locus* sued for, is below the southern line of the plaintiffs' grant, if exten-

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ded at right angles to the *channel of the river*, from where it struck the water; and is not included in the grant thus bounded and defined.

The argument of the plaintiffs counsel is, that the grant is to the channel of the river, including *all water and land*, between its northern and southern lines—*extended* in the same *undeviating* course, from their commencement, as in the old English grant, to the *channel of the river*.

We contend for the defendants in error—

First—That the last, or supplemental grant, contained, in addition to what was embraced by the first, such lands as had been actually reclaimed by the grantees, at the date of said supplemental grant. If this construction should be accorded, the proof was, that the land thus reclaimed was all above, or north of the ground sued for. For this point, we merely ask the attentive examination by the court, of the *whole grant*.

Secondly—We contend, that if the grant was intended to embrace water, or ground covered with water, as well as actually reclaimed ground, then it was only such *space*, as would be contained between the northern and southern lines extended to the river, which is made the eastern boundary expressly, but that the grant there stopped; and that the right of riparian proprietor only, attached for any thing beyond the river to the eastward, and towards the channel.

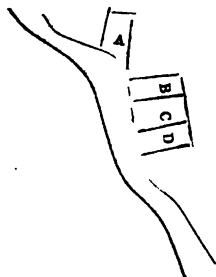
The court below, as I understand it, (and so it seems the opposite counsel understand the charge,) recognised the right of the riparian proprietors, as to all reclamations in *front* of his land; but charged that the grant

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extended only to the river as its eastern boundary, that is, to high-water mark. The error imputed to the court below, is refusing to charge, that the grant ought to be construed, as if it had expressly said, that the grantees should have and possess all the land and water contained between the north and south lines of the original grant, *extended* in the same unvarying course throughout their whole extent, to the channel of the river. Now, admit that the sovereign can grant the *shore*, that is, the space between high and low-water mark, and *the water of the river* to the channel,—which it would seem has been done, and sustained by the English Judges; yet, by all the authorities, nothing can be taken by *intendment*, against the sovereign in his grants; but they must be construed strictly—(6 Peters' R. 738; Dyer a 362, a; Cro. Car. 518; 11 Peters' R. 421.) I feel assured, that the express terms of the grant do not go to the extent contended for. All the purposes and motives of the grant, as declared on its face, are accomplished without this construction; and it is so unjust, that it ought not to be *presumed* to have been *intended*, even if it could be supported by *intendment*. The *benefit of the water* is a natural advantage, intended for those who own the contiguous soil, or *terra firma*, and ought to belong to all who border upon it, in proportion to the extent of that border. In the nature of things, the riparian proprietorship has reference to *the water*, and not to the *shape* or quantity of land extending back from the *marginal basis*. If the rights of the riparian proprietor are referable to the fact of his owning the contiguous land, that is, as arising from such ownership of the marginal soil,—

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then the absurdity of the doctrine, that those rights are at all dependent upon, or to be affected by, the course of his other boundary lines, can be easily exposed. Suppose, at the bend of a river, the marginal proprietor, A, should claim the extension of his lines in the same course, as when they strike it, as in the following diagram*



he would deprive all the riparian owners, B, C and D, of any rights of accretion, piscary, waifs, &c. though they are liable to have all their property swept off by the stream, from all benefit of which, they are thus excluded. Now, by the rule for which we contend, and seek to apply to the case in hand, no such inequality in the enjoyment of the advantages of nature will result.

For the principles applicable to artificial improvements, as were the wharf, &c. of the defendants, see *Angel on Tide Waters*, page 125 to 163.

*NOTE.—In reference to the ingenious position of *Thornton*, of counsel for the defendants in error, as explained by the diagram, it is not understood, that this case settles the doctrine of riparian rights, as they stand uncontrolled by the express terms of a grant. What might be the decision in a case where the boundary of land was high-water mark, and where no grant of land below that point, was made,—is yet unsettled. The argument of *Thornton* would certainly present a strong view, if the court were called upon to settle the riparian rights of several owners, by the principles of relative justice: But in the present case, the right of the plaintiff in error was derived from the express terms of the grant; and therefore settled upon its construction alone.

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COLLIER, C. J.—In order to a solution of the questions of law arising upon the record, we will inquire—

First—What was the true eastern boundary of the land embraced in the grant made by the British government?

Second—What was the additional extent of the confirmatory grant made by the Spanish authorities?

First—The record contains no copy of the British grant, and to ascertain its terms, we must refer to that made by the Spanish authorities, in which it is recited. From that, it appears that the land was situated in the then district of Mobile, “on the west side of the river Mobile.”

The rights of riparian proprietors are diverse, depending upon the fact, whether their land is bounded by a river, where the tide ebbs and flows; or whether it lies along a stream above tide water. In the former case, the right of the owner to the soil, according to the common law, extends but to high-water mark—(3 Kent's Com. 344, and Angell on Tide Waters, 68.) The shore below the common tide belongs to the public, though by grant, it may become the property of the citizen—(3 Ib. 347.) But in *Arnold vs. Mundy*, (1 Halsted's R. 1,) it was determined, that a grant of land lying upon navigable water, reached only to high-water when the tide was at its flow, and to low-water mark when it had receded, thus diurnally changing the extent of the owner's right. And in *Handley's lessee vs. Anthony*, (5 Wheat. R. 374,) the court considered that the cession by Virginia to the United States, of all her right to the territory “situate, lying and being to the north-west of the river of Ohio,”

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was a relinquishment of title to the land lying above low-water mark on the north-western bank of that stream, and the case would not be varied, "if, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide." The rule, that a country bounded by a river would extend to low-water mark, "has (say the court) been established by the common consent of mankind. It is founded on common convenience." Whether the rule recognised in that case would have been considered applicable to a grant made by the public to an individual, the opinion does not inform us--but we suppose that it would not.

It is, however, unnecessary to enquire, what has been the course of judicial decision in the United States upon this subject; for the grant of seventeen hundred and sixty-seven, must be expounded with a reference to the English common law, as applied in Great Britain and her dependencies. And that system of jurisprudence, according to all authority, does not allow the riparian owner, under a grant from government, of lands *bounded on tide water*, to go beyond *ordinary high water mark*--(Storer *vs.* Freeman, 6 Mass. R. 438; Cortelyou *vs.* Van Brundt, 2 Johns. R. 357.) The rule which determines this to be the extent of the grantee's interest, is founded upon the principle, that such grants are construed most favorably for the sovereign; and derives force from the consideration, that public grants are made by a trustee for the public, and no alienation should be presumed, that was not clearly expressed.

Though the proprietor or his assignees under the

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British grant, acquired no title to the soil lying between high and low-water mark, yet they were entitled to all accessions made to their land, either by the retreating of the river from its former limits, or by the slow and secret deposit of sand or other substances, so as to leave the soil theretofore inundated, uncovered by water—(Angell on Tide Waters, 68; 3 Kent's Com 344, *et post.*)

In *New Orleans vs. the United States*, (10 Peters' R. 717,) "the question is" said to be "well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded, is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain." The beds of navigable streams, as well as the sea, belong to the public. And if by the instantaneous casting up of sand or other substances, the water is thrown back and an addition made to the land, the sovereign may claim the accession, upon the ground that it was but a part of the bed of the river or sea, of which he was the proprietor. But if the increase was occasioned by a process so slow and secret, as renders it impossible to discover how much is added in each moment of time, it belongs to the proprietor of the land to which the addition is made—(Angell on Tide Waters, 68; 3 Kent's Com. 345; and the *King vs. Lord Yarborough*, 3 Barn. & Cress. R. 91.) The civil law, from which the common law on this subject is copied, says, "what the

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river adds by alluvion to your estate, becomes yours by the law of nations. Alluvion is a latent increase. That seems to be added by alluvion, which is so added by degrees that you cannot know how much in each moment of time—(Angell on Tide Waters, 69.) And to the same effect is the very learned and elaborate argument of Mr. Livingston, (and the cases therein cited,) in regard to the Balture at New Orleans—(2 Am. Law Journal, 326, 330.)

Without extending to greater length our enquiries upon this branch of the case, we think it is sufficiently shown that the British grant only conveyed to its grantee a title to the land above high-water mark, with a right to the gradual accessions by alluvion, &c.—(Bullock vs. Wilson, 2 Porters' R. 436; see a note by the Reporter, 6 Cowen's R. 536, 541, *et post*; and 10 Peters' R. 662.)

Second—The Spanish grant, after stating the boundaries of the land conveyed by the British government to William Richardson, and that it lies on the west side of the river Mobile, and is "terminated by the bank of said river on the east side"—shows a deficit in the number of acres proposed to be granted, and continues, "Nevertheless it must always be understood, in order that it may never operate to the prejudice of the party interested, that the said two hundred and sixty-three English acres are equal to three hundred and ten arpents, seventy-seven and one-eighth perches aforesaid; and also that the distance described in said plat or plan of survey between the river and the limits (east) of the tract, and which was left at the time unsurveyed, it being then impassable, has since been rendered useful by the owners having ditched and drained the same, and which they are to re-

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ceive in compensation for the above-mentioned error, with the reserve, however, of leaving a free passage on the bank of the river, and without altering the figure of the tract on the other side," &c. Here is a clear grant of all the soil lying between the tract first granted and the river, designated upon the plat or plan of survey accompanying the Spanish grant. Where the term "river" is used as a boundary, either high or low-water mark must always be intended, and not some middle point. The land embraced by the British grant is "terminated by the bank of said river (Mobile) on the east side,"—by the "east side," we are to understand the *eastern boundary of the tract*, and not the eastern margin of the river. It is, then, clear, beyond controversy, that the grant of seventeen hundred and sixty-seven, extended to the river, which, as already shewn, was high-water mark.

The grant of eighteen hundred and seven, reaches not only to the eastern limits of the first grant, but embraces "the distance in the plat marked out as being from the river to the limits east of the land, and left unsurveyed at that period, (1767) &c. and which they (John Forbes & Co.) are to receive in compensation for the above-mentioned error," &c. Here, again, "the limits east of the land," mean the eastern boundary of the British grant—"the river" evidently refers to some point below high-water; for if high-water mark were intended, there would have been nothing additional granted, as the first grant extended thus far.

If all the soil lying east of the British grant and the channel of the river, had been expressly granted, there then could have been no controversy as to the extent of

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the claim of Forbes & Co. And is not their title as clearly made out by the proof, as it would then have been? The marsh lying between the land covered by the grant of seventeen hundred and sixty-seven and the river, is described in a *plat or plan of survey accompanying, and made part of the grant of eighteen hundred and seven*, and together with the land embraced by the former grant, is all conveyed to the grantees. This marsh either then was, or had been subject to inundation by the flowing of the tide, and by the manner in which it is described in the *plat*, must have been at least a part of it below high-water mark in eighteen hundred and seven. Here, then, the Spanish government, in terms not at all dubious, have granted the *soil between the original tract and the river*. The original tract, we have seen, had for its boundary on the east, high-water mark. What distance, then, could have been described in the *plat or plan of survey*, but the land lying between high-water and the channel of the river? *Besides*, the copy of the survey accompanying the record, indicates as clearly as possible that the intervening space was marsh or flat land, partially inundated, and that it extended to the stream, even when the tide had receded.

The north and south lines, running from west to east, are plainly traced on the plat, and continued without any deflection, from the point at which they strike high-water mark, across the marsh to the channel of the river. Here is a conclusive indication of what land was embraced by the survey. A copy of the *plat, or plan of survey*, we have seen, is made part of the grant; so that the grant of eighteen hundred and seven must be regarded as quite

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as explicit an indication of the eastern limits of the tract, as if it had *in totidem verbis*, transferred to John Forbes & Co. *all the land lying between the north and south lines, extended east to the channel of the river.* This single view is decisive of the case, as presented by the record; but least it may appear upon another trial, that the plan of survey now before us, is not a correct copy of the original, it will be proper to consider the case in reference to such a contingency.

Even if the original plat or plan of survey should not discover a continuation of the northern and southern lines of the *original tract*, drawn east to the margin of the channel of the river; yet, inasmuch as it designates the marsh lying between high and low-water, and the grant of eighteen hundred and seven relinquishes to John Forbes & Co. the part of the marsh lying east of the land embraced by the British grant, "*in compensation*" for a deficiency between the land intended to be thereby granted, and that received by the original grantees,—these lines must be run without deflection from high-water mark to their eastern *termination*. How else could *all* the land east of the British grant and west of the river be embraced? There is certainly no warrant for maintaining, that less than all, was relinquished to the grantees in eighteen hundred and seven. If these lines should diverge, then they would embrace a larger quantity of land than lies east of the tract, but if they should converge, then the quantity would be less. So that the only way in which the Spanish grant can operate according to its terms, is for these lines to continue an unvarying course to their termination.

That it is competent for a grant to refer to a plat or plan of survey, in order to ascertain the locality and lines of the land, is a proposition, which it is supposed no one will dispute. In Jackson *ex dem.* Livingston vs. Freer, (17 Johns. R. 29,) it appeared that a large tract of land was granted by the commissioners of the land office—it was described by its exterior lines alone, and a survey directed to be made by the surveyor general—and patents were to be issued for the several lots according to the return and map of such survey. The survey and return was made, and patents issued describing the several lots by reference to the map of the survey on file in the office of the Secretary of State. It was held, that the patents were to be understood as referring not only to the map on file, but also to the field book of the actual survey.

And it is well settled, that where a line is described as running towards one of the cardinal points, it must run directly in that course, unless it is controlled by some *object*. Thus, in Brandt. *ex dem.* Walton vs. Ogden, (1 Johns. R. 156,) it was determined, that “the term *northerly* in a grant, where there is no object to direct its inclination to the east or to the west, must be construed to mean *north*, and there being no object to control, it must be a due north line.”—(See also Jackson *ex dem.* Woodworth vs. Lindsay, 3 Johns. R. 86; Jackson *ex dem.* Clark vs. Reeves, 3 Caine’s R. 293.) As “the distance in the plat marked out as being from the river to the limits east of the land,” cannot be included by allowing the north and south lines to converge, and as divergent lines are not authorised, the grant of eighteen hundred and

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seven, must be construed as directing an extension of these lines to the river, without variation of course.

It is not essential to the plaintiffs title, to show that all the marsh was drained previous to eighteen hundred and seven, or that it had been reclaimed since that period. It is true, that all this is described in the Spanish grant, as having been rendered useful by the owners having ditched and drained the same, and which they are to receive in compensation for the *deficit* in the quantity intended to be conveyed by the British grant. That the Spanish authorities believed that the marsh, or the greater part of it, lying between the river on the east, and the original tract on the west, had been drained, we think probable, from the terms employed. Yet an ignorance of fact, in this particular, can not be held to control the plain language of the grant, and limit its operation to so much of the land as was actually drained;—most certainly not in a controversy with a mere occupant, who relies upon no title subsequently acquired from the authorities of Spain. The plat or plan of survey does not trace any ditch as having been cut through the marsh; and the river being declared to be the eastern boundary of the land covered by the grant, there is no authority for stopping at any point between the channel and high water mark.

The reservation of a free passage on the bank of the river, did not prevent the freehold in all lands described in the plat or plan of survey from vesting in the grantees—the title vested charged with the servitude. The free passage was subject to be changed by the grantees, or their assignees, as the river might gradually recede

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from its limits, so as to continue it along the bank. Nor can the fact of a road running along the bank of a navigable river, be held to limit a grant having the river for its boundary, so as to exclude its proprietor from riparian rights; and in this case there cannot be the slightest pretence for such an idea. The *freehold* in the land over which the road run, did not continue in the Spanish government;—*that* was transferred by the grant, while its use only was to be enjoyed by the public—(Cortelyou *vs.* Van Brundt, 2 Johns. R. 351.) And the title to all the soil lying between the original tract and the river, having passed by virtue of the grant of eighteen hundred and seven, to John Forbes & Co., and of course to his assignees, they immediately became entitled to the right to alluvial formations, in the same manner as other riparian proprietors are, on navigable streams.

But even supposing that the Spanish grant only conveyed the title, to what was known as high-water mark, at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion. And if accretion is made impracticable, without the authority of government, by the labor of some third person excluding the water from its former limits,—shall such third person, who was himself a trespasser, derive a profit—or shall not he who has been deprived of an increase of soil by natural causes, enjoy what art has reclaimed? We merely propound this inquiry—the view we have taken of the case does not render its solution necessary. We need not consider whether, if the present were a controversy for land made by alluvion, the north and south lines should not take the

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nearest course from high-water mark to the river. And it is alike profitless to inquire whether one who does not own the adjoining land, may erect a wharf or other improvement for the benefit of commerce, between high and low-water mark, since it is clear that no part of such erections can be rested upon land of a third person, nor can such third person be excluded the use of the water, or denied other riparian rights.

The grant of eighteen hundred and seven, speaks its own meaning, with so much distinctness, as to relieve us from an examination of the doctrine in regard to the construction of public grants. The rule, that where there is *any doubt*, the construction is made most favorably for the public, is not denied, but its application is limited—it applies only in cases of real doubt—(See *Charles River Bridge vs. Warren Bridge, et al.* 11 Peters' R. 544—in which the learning on the subject is exhausted.)

Our conclusions, upon an examination of the plaintiffs title, are—

1. That the British grant transfers the title to high-water mark only.
2. That the Spanish grant confirmed the former, and in addition, granted *all* the land lying east of the original tract, to the channel of the river.
3. In order to embrace *all* the intervening soil, the north and south lines of the original tract must run without variation of course from high-water mark to the margin of the channel.
4. Either grant conferred upon its grantees, or their assignees, the right to any gradual increase of soil by the receding of the river.

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The judge of the Circuit court was of opinion, and so instructed the jury, that the grant of eighteen hundred and seven, only transferred the title to high-water mark on the east; unless the marsh had been reclaimed previously, or subsequently, by John Forbes & Co. or those claiming under them. The instructions, we have shown, cannot be sustained—the grant ascertains its own limits on the east, which is not liable to be varied by showing a portion of the marsh, or even all of it, unreclaimed in eighteen hundred and seven, or at any time since.

The judgment of the Circuit court must consequently be reversed, and the cause remanded.

GOLDTHWAITE, J. not sitting—having been of counsel.

1. Personal property is divided into things in *possession* or in *action*, and property in things in possession, is either *absolute* or *relative*.
2. A bailment is a qualified, limited, or special property, in a thing capable of absolute ownership.
3. Neither the bailor or bailee of a personal chattel has an absolute property in the chattel. The property in both is qualified, and each of them is entitled to his action, if the goods be damaged or taken away. The bailee, on account of his possession, and the bailor because the possession of the bailee is immediately his possession.
4. A chose in action, is any right to damages, whether arising from the commission of a tort, the omission of duty, or the breach of a contract.
5. Possession of lands by a guardian, in *socage*, is the possession of the ward : The possession of a bailee, is the possession of the bailor, and the possession of a guardian, is also possession of the ward.
6. The possession of the guardian of an infant female ward, is the possession of the ward ; and if the ward marry, the possession, *eo instanti*, is transferred to the husband, and the bailment is then in possession of the husband, in point of law, as much, as it could afterwards be, by an actual *manucaption*.
7. The actual enjoyment of a chattel, which accrues to the wife before marriage, is not necessary to vest her interest in the husband.
8. If a chattel be found, and not converted to the use of the finder ; or if it be hired, or loaned, or otherwise bailed ; it does not thereby become a chose in action ; and if it belong to a woman who marries, her right immediately vests in the husband, at least so far, that if she dies it will survive to him.

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Error to the Circuit Court of Greene.

Detinue for a slave. To the declaration, defendant plead *non detinet*, and the jury found a special verdict, as follows :

That on the first of January, eighteen hundred and thirty five, the slave was, and for a long time previously had been, the property of Jane Carnathan, then a minor and unmarried, and was in possession of her guardian, George Hays: That on the said first of January, eighteen hundred and thirty-five, the slave was hired by the guardian to defendant, John T. Magee, for the term of one year, and was delivered to defendant: That on the eleventh of June, eighteen hundred and thirty-five, Jane Carnathan intermarried with James Toland, the plaintiff: That on the twenty-sixth of August, eighteen hundred and thirty-five, said Jane died without issue, leaving the plaintiff, and the following brothers and sisters, to-wit, George Carnathan, Margaret Stewart, and Mary Magee, wife of defendant, John T. Magee, surviving: That from the first of January, eighteen hundred and thirty-five, as aforesaid, said John T. Magee held possession of the slave, by virtue of the hiring aforesaid, and did not assert or claim any other right, title or interest in the slave, adverse to the right of said Jane, and the plaintiff, to the slave: That from the first of January, eighteen hundred and thirty-five, until the death of said Jane, on the twenty-sixth of August, eighteen hundred and thirty-five, neither the said Jane, nor the plaintiff, James Toland, ever had the *actual* possession of the slave: That from the said first of January, eighteen hundred and thirty-five, until the present time, the slave had

been, and remained, and was, at the present time, in the possession of the defendant : That defendant had never been appointed administrator of said Jane : That on the first of October, eighteen hundred and thirty-six, plaintiff demanded the slave of defendant, who refused to deliver him to plaintiff, and that the value of the slave was five hundred dollars.

But because the jury were not advised whether, under the facts, the plaintiff was, by law, entitled to the slave ; if the court should be of opinion that the plaintiff was entitled to the slave, then the jury found for the plaintiff : *secus*, for the defendant.

The court being of opinion, under the facts, that the plaintiff was entitled to the slave, judgment was rendered accordingly ; and to reverse this judgment, the writ of error was sued out, and the rendition of judgment assigned as error.

Erwin, for the plaintiff in error.

Jones, contra.

GOLDTHWAITE, J.—It is obvious that the special verdict presents the question, whether the possession of the slave in controversy by the bailee of the guardian of the wife, at the time when the marriage was contracted, was such a possession by the wife as to transfer the property to the husband, by the mere act of marriage?

The solution of this question involves an inquiry into the rights of property acquired by a husband, which attach to him immediately, and in consequence of the marriage. The plaintiff in error concedes the general rule to be, that the husband, in virtue of the marriage, ac-

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quires an immediate property in the *choses in possession* of the wife, but he denies that any other than an *actual* possession can authorise the application of the admitted rule. This is certainly an ingenious distinction, and deserves to be well examined, as its adoption must have the effect materially to abridge the rights of the husband, as generally understood.

Personal property is divided into things in *possession* or in *action* ; and property in *possession* is again divided into two sorts—an *absolute* and a *qualified* property.—The first of these sub-divisions, is the one which the plaintiff in error denominates as an actual possession—it being where a man has solely and exclusively, the right; and also the *occupation* of any moveable chattel, so that it can not be transferred from him, or cease to be his, without his own act or default. A *qualified, limited, or special* property, may arise, either from the nature of the thing owned, or from the peculiar circumstances and situation of its owner. Many things may be owned, which are incapable of actual occupation, and absolute dominion at all times, such as wild beasts or birds, but partially reclaimed. and not domesticated.

But the more important distinction of a *qualified, limited, or special* property, grows out of the peculiar circumstances of the owner, when the *thing* itself is very capable of absolute ownership. Such is the case of a *bailment*, or delivery of goods to another, for a particular use or purpose : there is no *absolute property* in either the bailor or the bailee, for the bailor has only the right, and not the immediate possession : the bailee has the possession, and only a temporary right. But it is a qualified

property in them both, and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee, on account of his immediate possession; and the bailor; because the possession of the bailee is immediately his possession also. Such are the views of Blackstone, in relation to personal property in possession. His definition of a *chose in action* considered as property, is equally satisfactory and precise: it is where a man has not the occupation, but merely a *bare right* to occupy the thing in question, the possession whereof may however be recovered by a suit or action at law; from whence the thing so recoverable is a thing or *chose in action*. He considers that all *property in action* depends upon *contracts*, either express or implied, which he asserts to be the only regular means of acquiring a *chose in action*—(2 Black. Com. 388 to 396.) It will be remembered, that this learned author is treating of the nature of *property* in things personal, and therefore does not enter into any discussion of the distinction between rights of action for injuries done: he is only speaking of *choses in action* as property, and in this view no objection can be taken to the definition given, as we cannot conceive that one can have a *property* in a wrong done, or injury suffered.

In its more enlarged sense, a *chose in action* may be considered as any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract. And in this sense, it is considered by most other elementary writers—(Bro. Title, *chose in action*, Lilly's Abr. 264.)

It will be unnecessary to ascertain with exactness and precision, the nature of a *chose in action* or a right of ac-

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tion, if the slave in dispute is within the definition of *property in possession*, as given by the most approved elementary author, and fully supported by the authorities which he cites.

It appears that the slave was owned by the wife previous to, and at the time of the marriage, and was in the possession of the defendant as a bailee for hire, holding under the guardian of the wife. The authority already referred to, expressly states, that the possession of the bailee is also that of the bailor, and it only remains to show, that the possession of the guardian is also the possession of the ward. Independent of the manifest reason, that such a rule should obtain, we find no direct decision on the precise point, in relation to *personal property*, but the authorities are numerous and concurrent, that the possession of lands by the guardian in socage, is the possession of his ward, and that no entry is required to be made by him—(Coke on Litt. 15, a,—Newman vs. Newman, 3 Wils. 516; Doe vs. Keene, 7 Term Rep. 386.) No reason is conceived by the court, why the possession of the guardian should not be held as the possession of the ward, in relation to all personal chattels capable of possession, as it is clearly a title derived under the ward, and held solely and exclusively for his benefit. The guardian has an interest in the thing possessed, without which he would not be able to sustain an action; but such interest is consistent with, and ancillary to the property of the ward,—it never has been supposed otherwise.

As the possession of the defendant below was the possession of the wife, at the time when the marriage was

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contracted, it results that the property in the slave in question, was transferred to the husband at the instant of marriage, and was then as much in his possession in point of law, as it could afterwards have been by an actual *manucaption*.

It is, however, contended, that whatever may be the rule of the common law on this subject, this case must be governed by a previous decision of this court, which is said to decide the identical question here presented. The case referred to, is Johnson vs. Wren, 3 Stewart, 172. Without undertaking to pronounce what weight that case ought to have on one presenting a similar state of facts, we content ourselves with observing, that there the question of possession was left to the jury on the evidence, and was not before this court on any exception to the charge of the Circuit court. It is true, that the court seemed to consider the estate, in the slaves, as one in action and not in possession; but as the point did not arise in this court, we do not feel inclined to consider it as closing the investigation in this case. Another distinction between that and this case, is to be found in the fact, that there, the wife, and here, the husband is the survivor. Neither does this case resemble, in any respect, that of Mayfield vs. Clifton, (3 Stewart, 375,) which was decided on the conflicting claims of a husband and the children of his deceased wife, to her undivided distributive share of the estate of her former husband.

We will now ascertain how far the principle we have recognised as applicable to this case, has the sanction of adjudicated cases in this country in its support, remarking, that there is a total absence of cases on this subject in the English reports.

In the case of *The Ordinary vs. Geiger and wife*, reported from the MS. reports of Judge Brevard, in 2 N. & McCord, 151—the facts were as follow: The mother of Geiger's wife, while sole, made and executed a deed of gift of certain negroes, to her four children, jointly. Afterwards, one of these children married Geiger, the intestate. On the marriage, one of the negroes given as aforesaid, was sent with her on her going to live apart from her mother, and remained with her ever since. No regular partition was ever made of the property between the donors. After the death of Geiger, his widow intermarried with the other defendant, and they jointly administered on his estate, and in the inventory returned to the ordinary, made no mention of the negroes given as aforesaid. The question was, whether this omission was a breach of the condition of the administration bond. The court were all clear, that a *right of possession*, vested instantly on the execution of the deed of gift, and that the female defendant was entitled, as a joint lineal to the property given, and therefore that on her intermarriage with Geiger, the property and right of possession which she had, vested in him, and became a part of his personal estate, and ought to have been returned as such in the inventory.

In *Davis vs. Rhame*, (1 McCord's Chan. Rep. 195,) the slaves had been allotted by partition to Miss Davis, (afterwards Mrs. Clark)—She was then a minor, and her slaves went into the possession of Rhame, her guardian, who dying, his executor took possession of them. *After the death of Mrs. Clark*, her husband obtained possession of them. The court decided that *the possession of the*

guardian was the possession of the ward, and consequently her husband's.

The same principle was recognised and confirmed in *Saussey vs. Gardner*, (1 Hill, 191.)

In North Carolina, the same principle has been acted on, in the case of *Armstrong vs. Simonton's adm'r*, (2 Taylor, 266; S. C. 2 Murphy, 351.) The slave sued for was owned by the plaintiff, whose daughter intermarried with Simonton, and to whom, residing in Georgia, she loaned or gave a slave. After the loan or gift to Simonton, the plaintiff intermarried with Abel Armstrong, who died before Simonton, and before this suit was commenced. The judge who tried the cause, instructed the jury, that if the transaction was a loan, determinable at the will of the lender, *and there was no adverse possession set up*, the property vested absolutely in Abel Armstrong, on his intermarriage with the plaintiff, and that his executors could alone recover it. This opinion was pronounced correct by the Supreme court.

In Kentucky, in *Banks' adm'r vs. Marksberry*, (3 Litt. 275,) the facts were as follow: In seventeen hundred and seventy-three, Samuel Marksberry executed a deed, by which he gave a female slave to his daughter, Rachel, but by the terms of the deed, was to retain possession during his life. Rachel intermarried with William Banks, in seventeen hundred and ninety, and after having several children by him, of whom the plaintiff was one, died in seventeen hundred and ninety-eight. Her father, Samuel Marksberry, the donor, died some years afterwards. The plaintiff, in eighteen hundred and twenty one, took administration on the estate of Rachel

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Banks, his mother, and instituted the suit to recover the slaves descended from the one given to her. It was ruled, that the slaves were not *choses in action*, and that the interest of Rachel vested in her husband, although she never had the possession, and died before she was entitled to it by the terms of the gift. The language used by the court is peculiarly appropriate, and may be quoted to illustrate this case. "The slaves were in the possession of the donor, but his possession was consistent with the title of Mrs. Banks, and not adverse. There is no proof that he ever did, prior to her marriage, set up any claim to the slaves, incompatible with the deed of gift; and under that he had only a right to the use of them for life, while the absolute property in fee belonged to Mrs. Banks. She had, in fact, the general, and he only a special property in the slaves; and it is a known rule of law, that the general property of a chattel, draws to it the possession. She was not indeed in the actual enjoyment of the slaves, but surely every chattel, of which the owner is not in the actual enjoyment, cannot be denominated a *chose in action*. Nor is such actual enjoyment of a chattel which accrues to the wife before marriage, necessary to vest her interest in the husband. If a chattel be found, and not converted to the use of the finder, if it be hired or loaned, or otherwise bailed, it does not thereby become a *chose in action*, and if it belongs to a woman who marries, her right immediately vests in the husband, at least so far, that if she dies, it will survive to him."

Similar decisions have obtained in Virginia, from the earliest establishment of courts. (See Dade vs. Alexan-

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der, 1 Wash. 39—cited with other cases with approbation, in *Wallace vs. Taliaferro*, 2 Call, 470. See also in connection with the subject matter, *Doe vs. Polgrean*, 1 Hen. Black. 535; *Coke Litt.* 351, a; 3 Term Rep. 631; *Crozler vs. Bryant*, 4 Bibb, 174; *Pinkard vs. Smith*, *Littell's Selected Cases*, 331.)

Such a concurrence of authority, in so many of the States, holding the peculiar description of property, which is oftener the cause of a qualified or special estate, than any other description of personal chattels, requires the strongest reasons to be shewn for a departure from the general rule. None such have been, or in our opinion can be, shewn.

The judgment of the Circuit court is affirmed.

Murray vs. Williams.

MURRAY vs. WILLIAMS.

1. The proceedings of a justice of the peace, in a case of forcible entry and detainer, can only be reviewed in the Circuit court, on such errors, as the attention of the court is called to by an assignment,—and an omission to make one, is fatal.

Error to the Circuit court of Russell county.

Forcible entry and detainer. This case was brought by *certiorari*, to the Circuit court, where the judgment, rendered on the verdict of the jury, by the justice, was overruled, without an assignment of errors. The writ of error was sued out to reverse the judgment of the Circuit court.

Geo. Goldthwaite, for the plaintiff in error.

Phelan, contra.

Goldthwaite, for plaintiff, contended—that there was no error in the record of the justices court ; and that an assignment of errors in the Circuit court was indispensable, to enable it to review the decision of the magistrates court : and to this effect, cited, *Collier vs. The State*—(2 Stewart, 388 ;) *Barr vs. White*—(2 Porter, 346 ;) *Alldridge vs. Hightower*—(4th Porter, 418.)

GOLDTHWAITE, J.—Process of forcible entry, was issued by a justice of the peace, at the suit of the plaintiff, against the defendant in error, who, on the trial of

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the cause, was found guilty. He sued out a writ of *certiorari* to the Circuit court, which reversed the proceedings, without any assignment of errors. To reverse this judgment of reversal, the writ of error is now prosecuted; and the plaintiff in error assigns for error, the omission of an assignment, in the court below.

The proceedings of the justice of the peace could only be reviewed in the Circuit court, on such errors as the attention of the court was called to by an assignment, and the omission to make one, is a fatal defect. This question was so determined in the case of Aldridge *vs.* Hightower—(4 Porter, 418.)

Let the judgment of the Circuit court be reversed, and the cause remanded for further proceedings.

GAZZAM, et al. *vs.* BEBEE & CO.

1. A discontinuance as to one of the parties, to a case on whom the writ has been executed, is a discontinuance as to all.
2. To justify a discontinuance against one, who is sued as a partner, and on whom the process has been served, it should appear that he is not a member of the firm.

Error to the Circuit court of Mobile.

Case—tried before Judge *Pickens*. This case was commenced by a writ issued against fifteen defendants, stated therein to be owners of a steam-boat, for repairs done to the boat, and for work and labor done generally, not averring that the defendants were partners. The declaration charged them as partners and owners of the steam boat, and declared against some of them for repairs done to the boat, in one count, and in the other, for work and labor generally.

The writ was executed on five defendants—the others not found. The declaration recited that no service was perfected on sundry named defendants, and among them one of those, on whom the writ was executed, and discontinued against them. Judgment for plaintiffs. The following errors were assigned :

1. That the court erred in proceeding to render judgment against the plaintiffs in error, after the discontinuance entered by the plaintiffs, as to a part of the defendants sued in the writ.

2. That the discontinuance entered as to a part of the defendants, was a discontinuance as to all.

3. That the proceedings and judgment in the Circuit court, were irregular in this—that the writ was sued out against the defendants as joint defendants, whereas the declaration proceeded against them as co-partners.

4. That the proceedings and judgment in the Circuit court were irregular, in this—that in the plaintiffs declaration, in the commencement, the defendants were charged as co-partners, and in the body of the declaration, no liability of the defendants, as co-partners, was shewn—whereby the judgment was uncertain ; in as much as it did not certainly appear whether the recovery was had against them as co-partners, or as joint debtors merely.

5. That the court rendered judgment against John E. O'Connell—whereas, the suit had been discontinued as to him in the declaration.

6. That the plaintiffs discontinued their suit as to all the defendants, by discontinuing the same as to John E. O'Connell, who was duly served with process.

7. That the proceedings were irregular and uncertain, in this—that the names of the defendants were not fully set out ; that one of the defendants was sometimes called O'Conner, and at others, O'Connell : that, it was therefore uncertain who was sued, and against whom judgment was rendered.

8. That the proceedings were irregular and erroneous, in this—that it was uncertain as to whom the plaintiff had discontinued, and as to whom not : that in the declaration it was recited, that the plaintiffs discontinued their suit as to eleven defendants—whereas, in the minutes it was recited, that the plaintiffs discontinued as to six only of the defendants.

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9. That the proceedings and judgment were irregular, in this—that the plea was not continued at the spring term, eighteen hundred and thirty-four, nor at the fall term of eighteen hundred and thirty-four; wherefore, the proceedings were discontinued; and wherefore, the proceedings had at the spring term eighteen hundred and thirty-five, and all subsequent proceedings, were erroneous and void.

10. That the proceedings and judgment were erroneous, for uncertainty—in not specifying against whom the judgment was rendered, nor in whose favor; and for the uncertainty, variance, irregularity, and repugnance, in the several proceedings, as set out in the record.

11. That the indebtedness alleged in the declaration, was laid after the commencement of the suit; wherefore, it did not appear that the plaintiff had any cause of action against the defendants, at the time of the commencement of the suit.

Thornton, for the plaintiff in error.

ORMOND, J. The writ, in this case, issued against the plaintiff in error and fourteen others, as owners of the steam-boat Courier. The writ was served on but six. The action was assumpsit, for work and labor.—The plaintiffs declared against the defendants, as co-partners—and discontinued as to those on whom the writ was not served. A discontinuance was also entered as to John E. O'Conner, upon whom the writ had been served.

As the writ, in this case, does not describe the defen-

dants as partners, no aid can be derived from the statute, which makes a service on one partner a service on all.

By the fifty-eighth section of the act regulating judicial proceedings at common law, it is declared, "Where any suit shall be instituted against two or more persons as partners in any firm, if one or more persons, not partners in said firm, shall have been sued as such, the court before whom such suit is pending, shall discontinue said suit against such person or persons, as shall appear not to be partners in said firm, and proceed to judgment and execution against all or any of the defendants in such action, who shall appear to be partners."

It has been repeatedly held, in this court, that a discontinuance entered as to a party in the cause, on whom the writ has been executed, is a discontinuance as to all. (See *Saddler vs. Houston & Gillespie*—5th Stewart & Porter, 205—where all the cases are collated.)

The statute above cited, authorises a discontinuance, in a suit commenced against partners, when one or more persons, sued as such, *shall appear* not to be members of the firm.

To justify a discontinuance against one who is sued as a partner, and on whom the process has been served, it should appear that he is not a member of the firm; as it is on that condition only, that power is given to discontinue; and when the power is exercised, it should appear on the record that the discontinuance was for that cause. No reason whatever is given here, except that the writ was not executed on John E. O'Conner and others. Therefore, the suit as to them, is dismissed. The

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reason thus given for the dismissal, is not correct, in point of fact, as it appears from the record that the writ was executed on O'Conner.

The judgment must be reversed.

JORDAN *vs.* BELL.

1. A plea in abatement at the second term, which is rejected as coming in too late,—is no appearance to the writ.
2. A defect in a writ must be taken advantage of, by plea in abatement.
3. The time of holding court, is ascertained by law : and writs must be taken to be returnable to the next ensuing court, if issued more than five days previous to the term.
4. If judgment be rendered at a term to which the writ could not, legally, be returned, such judgment may be corrected on error—if the defect is not waived.
5. But on returning a writ to the wrong term, or where the day is mistaken,—the objection must be taken by plea in abatement.
6. The liability of the drawer or endorser of an inland bill, is fixed on presentment for acceptance or payment, and notice—But damages alone accrue on the *protest*.
7. And an averment in the declaration, of protest, is necessary to authorise damages to be given.
8. But the computation of damages by the clerk, without the averment of protest, is a mere clerical error, which may be corrected in the court below ; or in this court, at the costs of the plaintiff in error.

Error to the County court of Mobile.

This was an action of assumpsit, on an inland bill of exchange.

The judgment was taken by default; and the errors in the judgment, here insisted on, among others not considered by the court, were—

1. That judgment was taken by default for principal, interest and damages, when it was not shewn by averment in the declaration, that the bill had been protested.

2. That the judgment was taken by default for a sum in damages, in gross, without the intervention of a jury, including damages, interest, and cost of protest.

3. That the writ was issued and tested on the seventh day of June, eighteen hundred and thirty-six, and was made returnable on the second Monday of June next—and judgment was entered at June term, eighteen hundred and thirty-six.

4. That the writ was made returnable to the June term, eighteen hundred and thirty-seven, of the County court; and for that cause void in law.

Thornton, for the plaintiff in error.

GOLDTHWAITE, J.—The only assignments to which our attention has been called, are those which point out the supposed error in the return day of the writ, and the error in the amount of the judgment.

It may be questioned if the day is not well enough stated in the writ, as it is somewhat a forced presumption to conclude the relative *next* does not refer to the "second Monday," as well as to "June;" but if this is ad-

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mitted to be an error, in comes within the decision made in Nabors vs. Nabors, (2 Porter's R. 162.) There the writ was made returnable in *March*, when it should have been in *April*; and the defendant attempted to plead in abatement at the *second* term after its return. The plea was rejected as coming too late, and the defendant refusing to plead to the action, judgment was rendered against him. On a writ of error to this court, it was held, that the attempt to plead the matter in abatement, was not an appearance, and was no waiver of the defect. But the court also decided, that such a defect in the writ is not the subject of error—that it must be taken advantage of by plea in abatement, and can be in no other way.

The law having prescribed the time when the several courts in the State shall be held, it is a matter as much within the knowledge of the defendant as of the plaintiff, and he is also informed from the same source, that writs can only be made returnable to the next ensuing court, if issued more than five days previous to the time of its session.

If a judgment is rendered at a term to which the writ cannot be legally returned, such judgment can be corrected on error, if the defect or irregularity has not been waived: but in all cases where the writ is returnable to a wrong term, or where the day is mistaken, they come within the principle, and must be governed by the decision of Nabors vs. Nabors.

The liability of the drawer or endorser of an inland bill of exchange, becomes fixed on presentment for acceptance or payment, and on the notice given of the fail-

ure—but damages do not follow as a consequence of such demand and notice. They are given alone by statute, on the protest of the bill—(Dig. 329, s. 7.)

There is no averment in the declaration, that the bill was protested ; consequently, no damages could be given; or rather the clerk, in computing the amount for which to enter the judgment, was authorised to allow only the face of the bill, and interest on the same. But this is a mere clerical mistake, and could have been corrected, on the application of either party to the court below.

By statute, (Dig. 266, s. 48, 49,) this court is directed not to reverse any judgment for such an error, unless application has been made to the court below, and refused—but to order the judgment to be remanded and corrected, at the costs of the plaintiff in error.

We direct that the judgment of the County court be corrected, and here rendered for the proper amount, at the costs of the plaintiff in this court.

BOTTS vs. ARMSTRONG.

1. In proceedings before a magistrate, of forcible entry and detainer, force is the *gist* of the action :
2. And taking possession of the premises of another, and sending off his slaves, will, under the statute, amount to the force necessary to maintain this proceeding.
3. Though taking peaceable possession of the premises of another, under color of title, will not authorise the action of forcible entry and detainer.
4. Where the consideration of the evidence, shewing the circumstances connected with the entry of defendant upon the premises, is taken from the jury, by the charge of the court, the case will be remanded.
5. A peaceable entry may be converted into an unlawful detainer, if possession is unlawfully withheld from the person entitled to possession.

Error to the Circuit court of Mobile.

Forcible entry and detainer, tried before Judge *Harris*.

This case was brought up to the Circuit court, by *certiorari*, from a justice of the peace. Plaintiff below complained before the justice, of forcible entry and detainer, against the defendant, Botts, and one Jordan, against whom the case was discontinued, as it appeared the summons had not been served on him. Plea, not guilty. Verdict, guilty—and judgment accordingly.

The errors assigned in the Circuit court, were—

1. That the court below refused to quash the complaint and proceedings of the plaintiff in the cause as requested.

2. The court erred in proceeding against the defendant, Botts, after the plaintiff had discontinued his suit against the defendant, Jordan.

3. The court erred in rejecting as evidence, a certain power of attorney, made by Crocket and wife, when offered, as shewn by the record.

4. The court erred in rejecting the witness, Jordan, when offered by the defendant below.

5. The court below erred in the several instructions given to the jury, as shewn by the record.

The Circuit court affirmed the judgment, and the same assignment of errors was presented to this court.

Thornton, for the plaintiff in error.

Campbell, contra.

Thornton, for the plaintiff in error, said he did not insist on the reversal of this cause, for all the grounds assigned in the court below: He was inclined to think, as to the first, that the interest of tenant at will, was sufficient to maintain the action, though perhaps it should have stated *at whose will he was tenant*.

As to the discontinuance of the action against Jordan, on whom the summons was not served, perhaps the case was embraced by the rule which authorised a discontinuance at any time, against any one defendant, in an action *ex delicto*, &c. He relied with the utmost confidence on the fifth ground, viz. the instructions of the justice to the jury—particularly, because he charged, that an *entry* upon the possession of plaintiff below, subjected the defendant to the action, if that entry was made without

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the consent of defendant. Entry by B upon the possession of A, if made *peaceably*, though without A's consent, is not enough to sustain the writ of forcible entry and detainer—he must either have *entered forcibly*, or have *detained forcibly*. The *force* is the *gist*. As to what constitutes *force*, see the statute;—our statute is unlike the acts in some of the States, as, for example, Kentucky—(See Ky. Dig. vol. 1, 612; Woodfell's Landlord & Ten. 3 Marsh. 297—as to *forcible detainer*. By statute of Kentucky, *forcible entry* may be any entry against the will of possessor—so, 4 Bibb, 389, 192.)

Campbell, for the defendant in error.—An entry upon the possession of another, with the intention of depriving him of it unlawfully, is sufficient evidence of force, in an action of forcible entry and detainer—(3 Marsh. 344; 4 Bibb, 192, 388.) A right to property, without a right to immediate possession, does not authorise such an entry—(1 Porter, 144; 5 Stew. & P. 86.) A tenant at will, may maintain this action—(2 Marsh. 35; 5 Stew. & P. 86; Minor's R. 98.)

ORMOND, J.—The only error now insisted on, is the charge of the justice of the peace.

The substance of the testimony, as found in the record, is, that the defendant, as the administrator of one Inston, was in the possession of the premises, having some negroes there. That in his absence, the plaintiff, who had married one of the heirs of Inston, entered upon, and took possession of the premises, and also took away the negroes of the defendant, who were there.

The charge of the justice of the peace to the jury, is as follows: That it was their duty to ascertain from the evidence, who was in possession, when Botts and his friends went to the place. If Armstrong was there peaceably, Botts must be found guilty, as charged.

Secondly—Who is now in possession? If Botts, or his agent, how did he get there? If they went there in the absence of Armstrong, and entered upon the possession without his consent, they are guilty, as charged. If they were there under color of title, no matter how good, they are guilty. That if Armstrong was in possession, and Botts entered upon the premises without the consent of Armstrong, first had and obtained, either in writing or verbally, and in his absence, that this was sufficient to entitle the plaintiff to recover in this action. That the defendant, though he might claim under the heirs of Inston, had no right to take the possession without the leave or consent of Armstrong—that the law does not allow a man to wrest even his own property from another possessor, by force.

To support this charge, it is necessary to maintain, that the taking peaceable possession of the premises of another, under color of title, will support this action. This is a position which the statute will not sustain.

The first section of the act on which this proceeding is founded, declares "that no person shall enter upon any lands, tenements, &c. and detain or hold the same, but where entry is given by law, and then only in a peaceable manner.

The second section describes what shall constitute the force which will maintain this action, and declares that

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the carrying away the goods of the party in possession, shall be evidence of force within the meaning of the act.

The proof before the justice of the peace was, that the defendant below took possession of the premises, and carried or sent away the negroes of the plaintiff below, who were there. This was such force, as under the statute would maintain the action, if the jury believed the testimony. But they were prevented from considering it, by the charge of the justice of the peace, several times repeated, that if Botts entered on the premises without the consent of Armstrong, that Armstrong was entitled to recover; thus leaving entirely out of view, the *force* which constitutes the very gist of the action.

It is true, that at the close of the opinion, he says "that the law does not allow a man to wrest from another possessor, even his own estate, by force." But this cannot be considered a charge upon the testimony, but is rather a statement of the law, to sustain the charge before given on the evidence.

It is not for this court to say whether the jury would have given credence to the testimony or not, it is sufficient, that under the charge, it was entirely unnecessary for them to consider the only testimony in the cause, which was evidence of force, viz. the taking or carrying off the defendant's negroes from the premises, and by proof of which alone, the right to maintain this action could be supported.

The cases cited from the Kentucky Reports, are not applicable to this case. The statute of forcible entry and detainer of that State, contains this clause: "The forcible entry intended by this act is, and shall be, any

entry with or without multitude of people, against the will or without the consent of the person or persons having the possession in fact, of the premises into which such entry shall be made." The question of *force*, therefore, under this act, would be entirely unimportant, as every entry without the consent or against the will of the person in possession, is declared to be a forcible entry.

But by the statute of this State, to constitute a forcible entry, *force* is absolutely necessary; and the second section of the law enumerates the different acts which shall constitute the force, and without proof of which, the action for a forcible entry cannot be maintained.

By the third section, it is provided that no one who enters peaceably into the possession of lands, shall afterwards hold the same unlawfully, and with force, &c. Under this section, a peaceable entry into lands, will be converted into an unlawful detainer, if possession is unlawfully withheld from the person entitled to the possession.

This clause does not apply to the case at bar, which is for a forcible entry, and is only mentioned here to prevent any conclusion from being drawn, that the decision here made would apply to cases of forcible detainer, under the third section.

The judgment of the Circuit court is reversed, and the cause remanded, that the Circuit court may remand it to the justice of the peace, with directions to issue a *venire facias de novo*.

Halsted vs. Rabb.

HALSTED vs. RABB.

1. Where one was employed as clerk or agent to take charge of a mercantile establishment of complainant, who at sundry times furnished invoices of goods, and refused to render an account of sales or of moneys received—the jurisdiction of chancery is undoubted.
2. In agencies, including only a single transaction, such as a consignment of goods, or the delivery of money, to be laid out in the purchase of a particular thing, or to be paid over to a third person,—a suit at law is maintainable, and if a discovery were not desired, such a case would probably be only cognizable at law.

Error to the Circuit court of Conecuh, exercising Chancery jurisdiction.

Bill for discovery.—The bill was on motion of the defendant, dismissed for want of equity; and the plaintiff in error assigned :

1. That the court below erred in dismissing the bill for want of equity.
2. In rendering a plea against complainant for the costs.

Parsons, for plaintiff in error.

Porter, contra.

GOLDTHWAITE, J.—The decree of the Circuit court, dismissing the complainant's bill for want of equity, cannot be supported. On looking into it, we find it discloses that the defendant was employed as a clerk or agent to take charge of a mercantile establishment, for the be-

nefit of the complainant, who at sundry times furnished invoices of goods, to a considerable amount in value. It alleges that these were sold by the defendant, and have not been fully accounted for by him. That moneys have been received in the business, and not entered on the books, or otherwise accounted for; and charges many other matters which are deemed essential to a complete discovery and settlement of a matter of complicated agency.

It would be difficult to conceive of a matter of account cognizable in equity, if the facts stated in the bill will not authorise the interference of a court of chancery, and support its jurisdiction.

It will not be necessary to refer to individual cases to sustain the jurisdiction, although they are numerous and concurrent; but the rules applicable to cases of this description, may be stated from an elementary author of approved authority: "The most important agencies of this sort, which fall within the cognizance of courts of equity, are those of attornies, factors, bailiffs, consignees, receivers and stewards. In most agencies of this sort, there are mutual accounts between the parties, or if the account is on one side, as the relation naturally gives rise to great personal confidence between the parties, it rarely happens that the principal is able, in cases of controversy, to ascertain his rights, or to ascertain the true state of the accounts, without recourse to a discovery from the agent. Indeed, in cases of factorage and consignments, and general receipts and disbursements of money by receivers and stewards, it can scarcely be possible, if the relation has long subsisted, that very intricate and

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perplexing accounts should not have arisen, where, independent of a discovery, the remedy of the principal would be entirely nugatory, or grossly defective. It would be rare, if specific sales and purchases, and the charges growing out of them, could be ascertained, and traced out with any reasonable certainty; and still more rare, that every receipt and disbursement could be verified by direct and positive evidence"—(1 Story's Equity, 443.)

The bill charges, that the defendant was entrusted with the entire management of the business for about two years. It cannot be supposed, that the complainant could, by the use of any means in his power, trace out and identify all the sales and receipts which must have taken place during this period, and to deny him the aid of a court of equity in taking this account, is to deny him relief in any tribunal. In agencies of a single transaction, such as a single consignment, or the delivery of money, to be laid out in the purchase of any particular thing, or to be paid over to a third person, a suit at law would be maintainable, and if a ground for equitable jurisdiction was not laid, by reason of a discovery being wanted, it is perhaps the better opinion, that such a case would be cognizable alone at law—(Porter vs. Spencer, 2 Johns. Chan. R. 171.)

In the present case, the complication of accounts incident to the transaction of business of the description stated in the bill, combined with the relationship of agency, is sufficient to support the jurisdiction of a court of equity.

Let the judgment be reversed, and the case remanded for further proceedings.

PATTERSON, et al. *vs.* COOK.

1. There is no rule which allows this court to dispense with the examination of a case, because the amount involved is small.
2. An appellate court, can only learn from the record, what the verdict below was; and the entry of what may be the true finding, cannot control or diminish the force of that which is stated in the record.
3. Verdicts informally returned may be corrected at the time, at the instance of the party injured, or if returned in consequence of instructions of the court—a bill of exceptions may be entered, and the decision thus examined.
4. If the jury mistake the law, a motion to set aside the verdict, and for a new trial, is the remedy.
5. It is sufficient if the verdict respond to the issue framed: it is not necessary to pursue the very words.
6. If the point in issue can be ascertained by the verdict, it is the duty of the court to mould it into proper form.

Error to the Circuit court of Wilcox.

Assumpsit on a promissory note.

The action, in this case, was brought in the County court, where judgment was rendered for defendants, on a plea of off-set, for one dollar and four cents. To reverse the judgment, the case was then taken, by writ of error, to the Circuit court, where the judgment was reversed, and the cause remanded to the County court.

A writ of error was then sued out returnable to this court, and the plaintiffs in error assigned the reversal as error.

Patterson, et al. *vs.* Cook.

J. B. Clarke, for plaintiffs in error.

Phillips, contra.

Clarke, for plaintiffs in error, stated that the transcript of a verdict different from that inserted in the judgment, was sent up from the County court, and the questions presented were:

1. Whether the court could consider the verdict so inserted, as any part of the record.

2. If not, whether the verdict so inserted in the judgment was sufficiently certain.

He contended that the verdict, as inserted in the transcript, was no part of the record, and relied on *Mecclary vs. Cascaden*, Minor's R. 20; *Cunningham vs. Mitchell*, 4 Randolph's R. 189; *Root vs. Sherwood*, 6 J. R. 69; *Croswell vs. Byrne*, 9 Ib. 287; 2 *Dunlap's Prac.* 651, 666. And that the court must look to the issues and the verdict as inserted in the judgment—(*Pledger vs. Glover*, 2 Porter's R. 174.) That the verdict was responsive to the issues, and sufficiently certain. No verdict is perfect until it is recorded, and made public. A verdict must be enrolled before it becomes part of the record.

GOLDTHWAITE, J.—The defendant in error, in this court, commenced his action in the County court of Wilcox county, against the plaintiffs in error, who pleaded the general issue and a set-off. The issues were submitted to a jury, who returned a verdict, which is thus entered in the minutes of the court: "upon their oaths do say, they find a verdict for the defendants, and assess their damages at one dollar and four cents." On this

verdict, a judgment was rendered against the then plaintiff, for the sum so found, in favor of the then defendants. A writ of error was sued out to the Circuit court by the plaintiff in the action, and on assignment of error, the judgment was reversed. To reverse this, the original defendants here prosecute their writ of error.

It is much to be regretted, that so insignificant a sum should be the cause of so much litigation and expense to parties; but we know of no rule which allows us to dispense with the examination of a case, because the amount involved may be small. Parties are entitled to the considerate judgment of all courts, without regard to the sum in dispute; and principle may be as dear to him who is struggling against a demand for one dollar, which he supposes the law ought not to compel him to pay, as to another who is condemned in thousands.

For the plaintiffs in error, it is contended that the verdict of the jury, as it was actually returned by them, and which is certified with the record, shews that this balance was a sum due from another individual, to whom the note sued on was given, and that the plaintiff in the action ought not to be compelled to pay his debts, even if the law allows the note which he has become the lawful possessor of, to be offsetted in his hands.

Whatever may have been the verdict of the jury, we can only learn it, as an appellate court, from the language used in the record of that judgment which we are called on to correct; and the entry of that which may be the true finding, cannot control or diminish the force of that which is stated in the record.

If the verdict was returned in the form which is sup-

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posed, it could have been corrected at the time, at the instance of the party supposing himself injured by it, or if returned in consequence of any instructions from the court, he could have tendered his bill of exceptions, and thus have secured to himself the means of examining the decision. Or if the verdict was the result of a mistake of the law by the jury, a motion to set aside the verdict and for a new trial, would in all probability have induced a correction of the supposed error.

As the case is presented, it must be examined in the terms of the verdict of record. It cannot be supposed that the legislature intended that a jury would ever pursue the identical words of the act authorising them to return a verdict in favor of a defendant, when he insisted by plea on a set-off—(Dig. 281.) It is sufficient if the verdict responds to the issue formed, and it is not necessary to pursue the very words: such has been the uniform course of practice in this court. If the point in issue can be ascertained by the verdict, it is the duty of the court to mould it into proper form. No one can infer from the terms of this finding, on the particular issues submitted, any other matter than that the plaintiff in the court below was indebted to the defendants, in the sum ascertained by them, over and above the sum by him demanded. If it was contrary to the fact, the plaintiff to the action could have corrected it more to his satisfaction in the County court, than by suing out his writ of error. If, in accordance with the fact, the verdict was warranted by law, and ought not to have been set aside—in either case, he is without remedy in this, as an appellate court. The judgment of the Circuit court is reversed, and that of the County court affirmed.

M'KENZIE vs. M'RAE, adm'r.

1. If the evidence offered in a case, does not conduce or tend to prove the facts in issue, a motion should be made to exclude it from the consideration of the jury: but when the evidence tends to prove the issue, though not conclusive, such a motion cannot prevail.
2. Where evidence is circumstantial, and not conclusive, the jury are sole judges of the effect of the testimony, and are alone capable of deducing inferences from it.
3. Where one obtains a note surreptitiously, and disposes of it to a party cognizant of the fact,—such party cannot recover on the note.
4. Where one practices a cheat on another, in the transfer of a note, surreptitiously obtained, the party injured may recover back the consideration paid for the note.

Error to the Circuit court of Barbour county.

Trover for a promissory note, tried before Judge *Shortridge*.

Defendant plead, not guilty. Judgment for plaintiff.

Plaintiff in error assigned the charge of the court below, as contained in a bill of exceptions taken at the trial. Reference being fully made to the bill of exceptions, in the decision of the court, it is therefore unnecessary to set it forth at length here.

Porter, for the plaintiff in error.

ORMOND, J.—The action was trover for a promissory note, brought by the defendant in error, against the

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plaintiff. On the trial, a bill of exceptions was tendered by the plaintiff in error, from which it appears that the note was made by one William M'Rae, to the defendant's intestate, or bearer. The evidence, as to the manner in which the plaintiff in error acquired the note, and as to his knowledge, that Alexander D. McRae, from whom he acquired it, had no title in the note, was circumstantial. The court charged the jury, in substance, that if they inferred from the testimony, that the note sued for was the property of defendant's intestate, and that Alexander D. McRae had no title in it or right to dispose of it, but had surreptitiously obtained it, and that these facts were known to the plaintiff in error, that plaintiff's title was no better than his, and that they must find for the defendant in error.

The counsel for the plaintiff in error then moved the court to instruct the jury, that a note payable to bearer, (which was the fact in this case,) may be transferred by the bearer, though he may have acquired possession by finding, fraud or felony, and if the transaction on the part of the purchaser be *bona fide* and without notice, he acquires a good title. The court thereupon charged, that although in some cases a note payable to bearer, might be transferred by one having no title other than possession, and differed perhaps in this from a note payable to order—yet so far as this case was concerned, the law as to both was the same, provided the purchaser had notice of its being surreptitiously obtained by the person selling it. And if the transfer was before letters of administration had been granted, and Alexander D. was not such administrator, defendant below must have

known that Alexander D. had no right to transfer the note in question, if he got possession of it after the death of intestate, and that fact was known to him.

The court, at the instance of the plaintiff below, also charged, that if Alexander D. had practiced a cheat on defendant in the transfer, that he could recover back the consideration paid for the note.

We can see no error in either of the charges given by the court. The jury are the exclusive judges of the effect of testimony; if it be circumstantial, as in this case they alone can deduce inferences from it. If the evidence offered did not conduce or tend to prove the facts in issue, a motion should have been made to exclude it from the consideration of the jury. No such motion was made, and could not have prevailed, had it been made, as the evidence, though not conclusive, tended to prove the issue.

The charge asked for by the defendant below was in fact given, though with more circumlocution than was necessary. The jury were expressly told that the right of the plaintiff below to recover, depended on the fact, that the person from whom the defendant purchased the note, had surreptitiously obtained it, and that the defendant knew these facts: in such case, it is clear he would not be a *bona fide* purchaser, and therefore fell within the principle admitted in the charge asked for.

No question is raised here as to the influence which the act of eighteen hundred and thirty-three, (Aik. Dig. 330, sec. 18,) on the subject of notes payable to bearer, might exert in cases like the present, and therefore no opinion in relation thereto is expressed.

Lamb, trustee, *vs.* Wragg & Stewart.

The last charge given by the court is entirely correct.
Let the judgment of the court below be affirmed.

LAMB, trustee, *vs.* WRAGG and STEWART.

1. Where property is given or bequeathed to a married woman, without any qualification of the manner in which it is to be possessed or enjoyed, it vests, subject to the ordinary legal and marital rights of the husband.
2. But if it appear from the deed, or other instrument which transfers the property, that it was the intention of the donor or testator, that the wife should have an estate therein to her own separate use and disposal, such intention shall take effect, if it be fairly and clearly expressed.
3. The law favors the marital rights of the husband, and will not consider them to be interfered with, by any disposition of property made for the wife's benefit, unless there is a clear exclusion of his interest and control.
4. Where the terms employed by the donor or testator, in a gift or bequest to an unmarried woman, are, that the property shall be "at her own disposal," or, "for her sole and separate use," the property will vest absolutely in her as the owner, and it will be subject, upon marriage, to the marital rights of the husband.
5. Much stronger terms are required to indicate the intention of a donor or testator, to continue a distinct estate in an unmarried woman, after she shall come under the protection and control of the husband, than in the case of a gift or bequest to a married woman.
6. Where there is no indication of an intention in the deed of gift of slaves, of a father to his son-in-law, in trust, for his

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daughter, that she is to have the slaves at her own disposal, or for her own use, and as her separate property; and no terms to inhibit the husband from disposing of the slaves against the consent of the wife,—the husband must be taken to have acquired an estate for the life of his wife in the slaves, untrammelled by any right of the wife to dispose of them; and the interposition of a trustee, or the fact of the daughter being married at the time of the gift, can make no difference.

7. And where a life estate only is vested in the daughter, with the fee to her children—the children, if there be any, may have recourse to a court of equity, even during the life of the mother, to prevent the removal of the slaves, so as to put in jeopardy their eventual interest.

Error to the Circuit court of Montgomery.

Trial of the right of property, before Judge *Pickens*.

Defendants in error levied an execution upon sundry slaves, as the property of the defendant in the execution, which were claimed by plaintiff in error, as trustee for the wife of the defendant in the execution. Judgment was rendered against the plaintiff in error, who brought the case to this court for review.

On the trial of the case, plaintiffs in execution proved that the property levied on had been in the possession of John J. Lide, the defendant in the execution, and that he had controlled the same. The claimant of the property then produced two deeds, A and B, and proved that John J. Lide had resigned his trust, and that claimant had been appointed trustee to carry into effect the objects of the deeds. Evidence was offered by the claimant, for the purpose of shewing that Alexander Lamb was the owner of the negroes, previous to the execution of the deeds: that John J. Lide brought from South Carolina, in eighteen hundred and twenty-six, those mentioned in the

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first deed:—those mentioned in the last deed had been in possession of Lide for about five years prior to the trial: That there was no concealment in the neighborhood, on the part of the family, of the title under which the property was held, and that the deeds were recorded in Montgomery county, in September, eighteen hundred and thirty-two. The debt of the plaintiffs in the execution was contracted prior to the record of the deed.

Claimant moved the court to charge the jury, that if they believed the negroes were the property of Lamb, at the time of the execution of the deeds, and that he had executed them in good faith—they were sufficient to create a separate estate in the wife; and that the negroes were not liable to payment of the husband's debts. This charge the court refused; and charged the jury, that if the negroes were the property of Lamb, and were conveyed by him in good faith, and Lide entered in possession under the deeds—yet if they had been in his possession for the term of twelve months in this State, and the debts were contracted here, and the deeds were not recorded according to law,—they were subject to the payment of the debts, unless the creditors had notice of the contents of the deeds.

Claimant then moved the court to charge the jury, that if they believed the negroes were in possession of Lide as trustee merely, and that his wife actually enjoyed the benefits provided in the deeds, the property was not liable—which the court also declined. The refusal of the court to charge as desired, was assigned as error.

The deeds, A and B, were similar—deed A was as follows:

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"Know all men by these presents, that I, Alexander Lamb, &c. in consideration of the love and affection, which I bear to my daughter Mary Jane Lide, and of one dollar to me paid, the receipt of which is acknowledged, have sold, bargained and delivered, and do hereby bargain, sell and deliver, unto John J. Lide, in trust for my said daughter, for and during the term of her natural life, four slaves, to wit, Beriah, &c., and their increase—and after the death of the said Mary Jane, I give the said negroes and their increase, to such child and children of the said Mary Jane, by the said Lide, as may be living at the death of the said Mary Jane. And I do nominate and appoint John J. Lide, sole trustee, to hold said negroes, and to execute the trust herein-before reposed. To have and to hold the said negroes to the said John, for the purposes herein-before enumerated, to his executors, or administrators and assigns. In witness," &c.

Campbell, for plaintiff in error.

Campbell, for plaintiff, contended that the deeds disclose a clear intention on the part of the grantor, that the beneficial use of the property should be enjoyed by the wife separately from her husband—He is made trustee, which excludes the idea of an usufructuary interest in him.

The term of "the natural life" of the wife, is the period during which his office of trustee is to be exercised, and the period in which such an office is necessary to guard the interests of the wife. Natural love and affection for the daughter of the grantor, is the consideration

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on which the deed is founded; and the children of the daughter of the grantor, are the objects of his bounty upon the termination of the life estate of the daughter. No interest is left in the trustee, except during the life of his wife, and the interest is to be held "in trust for the wife"—(3 Bro. Ch. R. 383; *Johnes vs. Lockhart*, 6 Con. Eng. Ch. R. 446; 2 Atk. 558; 3 Ib. 399; 4 Dess. 458; 2 S. & R. 275; 5 Vesey, 517, 545; 3 Rand. 373; 2 P. W. 316.)

Upon the second question presented by the bill of exceptions, he contended —

That none of the statutes of this state require a deed of trust of personal property, when possession is transferred, to be recorded. That those deeds which are rendered void for want of registration in favor of creditors and purchasers, are still good between the parties—That the creditors and purchasers referred to in those statutes, are creditors and purchasers of the grantor of the deed, and not of any third person who may be in possession of the property—That the term "deeds of trust" in the statute, referred to in the opinion of the Circuit court, means a deed of trust for the payment of debts, and is intended to settle the priority between creditors—and is not applicable to trust deeds in favor of married women, when possession is delivered to the trustee or her husband—(5 Rand. 211; 5 Cranch, 154; 5 Stew. & Por. 142; 7 Peters, 348; 6 Ib. 124; 1 Stew. & Por. 262.)

COLLIER, C. J.—The bill of exceptions, in this case, raises one question, touching which, if our opinion be favorable to the defendants in error, we need not look far-

ther into the points raised at the trial. That question is this: Does a deed of gift, made by a father to a son-in-law, in trust for his wife, (the daughter,) for and during the term of her natural life, and after her death, to such child or children of their marriage, as may then be living, vest a *separate estate* in the wife and daughter for life?

It may be laid down as a general rule, where property is given or bequeathed to a married woman, without any qualification of the manner in which it is to be possessed or enjoyed, that it will vest subject to the ordinary legal and marital rights of the husband. But if it appear from the deed, or other instrument which transfers the property, that it was the intention of the donor or testator, that the wife should have an estate therein to her own separate use and disposal, such intention shall take effect, if it be fairly and clearly expressed. What terms are necessary to speak such an intention, it is not always easy to determine. The books contain some cases marked by nice distinctions, and the decisions even of the same court upon this subject, have not, in every instance, maintained uniformity.

In *Hartley vs. Hurle*, (5 Vesey, jr. 544,) the *Master of Rolls* decided that a bequest in trust, to pay the annual produce of a fund created by the testator, *into the proper hands* of a married woman, was a bequest to her separate use. But in *Tyler vs. Lake*, (6 Cond. Eng. Ch. R. 450,) it appeared that lands were settled upon trust, after the death of the settler, to sell the same and distribute the proceeds among all the settler's children *nomi-*
natim; and as to the shares of two who were married

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women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands, for their own use and benefit. The Lord Chancellor, in delivering his opinion, remarks: "Neither do I think that the direction which is superadded, 'to pay the shares into their own proper hands,' either taken singly or in connection with the rest of the clause, is sufficient to create a separate estate in the wife. The only authority cited for such a proposition, is *Hartley vs. Hurle*, which was a case under peculiar circumstances, and in which that was not the point principally considered."

In *Lumb vs. Milnes*, (5 Vesey, jr. 521,) the *Master of the Rolls* considered that the mere fact of vesting the estate in trustees for the benefit of the wife, did not create a sole and separate interest in the wife, and he assumed that no case had ever gone the length of so deciding. And in *Kensington vs. Dollond*, (7 Cond. Eng. Ch. R. 322,) it appeared that by the marriage settlement of a widow, her property was assigned to two trustees upon trust, to invest and pay the dividends to her for her life, for her own sole and separate use, and after her decease, upon trust, to pay the fund to a daughter by her first marriage, (who was then married) "for her own use and benefit." The daughter's husband becoming bankrupt, it was held, that on the death of the tenant, for life, his assignees were entitled to the fund subject to the wife's equity for a settlement. The *Master of the Rolls* observed, that "the intention to give a separate estate must be clearly expressed. A gift to a wife for her

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own use and benefit, does not clearly express such an intention; nor does a gift to a husband for his wife's own use and benefit, (the husband being one of the trustees of a settlement) clearly indicate such an intention."

The law seems rather to favor the marital rights of the husband, and will not consider them to be interfered with, by any disposition of property made for the wife's benefit, unless there is a clear exclusion of his interest and control—(2 Atk. R. 561; 3 Ib. 399.) In *Wagstaff vs. Smith*, (9 Vesey, jr. 520.) a trust was created by will to permit a married woman to receive the interest or dividends of stock to her own use during her life, independent of her husband. The *Master of the Rolls* determined, that by the terms of the trust, an absolute and complete life interest passed to the wife—(See also *Lumb vs. Milnes*, (5 Vesey, jr. 528.) And in *Jamison's ex'or vs. Brady and wife*, (6 Serg. & R. Rep. 406.) it was made a question, whether a bequest to a married woman *for her own use*, conveyed to her an interest *for her own separate use*, and it was adjudged that it did. The court lay great stress upon the intention of the testator, not alone as it was to be gathered from the will itself, but as it was inferable from extrinsic circumstances. It appeared in proof, that the husband was indebted to the testator: this circumstance is remarked upon by the court, as indicating the testator's intention to vest a separate estate in the wife; otherwise, his bounty would be of no avail to the wife, but would operate rather as a release of the husband's indebtedness.

The cases most favorable to the interest of the wife, are decisions of the Court of Chancery of South Carolina.

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In *Judith Barrett vs. Judah Barrett*, (4 Dess, 447,) a bill was filed by the wife against the husband, to have the benefit of a deed executed between the parties immediately before marriage, which it was alleged was intended to secure the property of the wife in possession, and in expectation, to her separate use. The clause of the deed relied on by the wife as having that effect, was as follows: "The said Judith Barrett, being desirous of settling and limiting her property in a particular way, the property described shall be limited to the said Judith Barrett, during her natural life, and to such issue as she may have by the said Judah Barrett; and in case the said Judah shall survive the said Judith, and she should leave no issue, the whole of the property is to descend to the said Judah." The chancellor who presided on the circuit, held, that this clause vested in the wife a separate estate, but the *Court of Appeals* reversed his decree, maintaining the law to require a clear manifestation of intention to divest the marital rights of the husband, before a distinct interest could be set up in the wife. And in *Johnson vs. Thompson*, (4 Dess. R. 458,) a case which depended upon the construction of a deed of gift, which a father made of certain personal property, to a daughter who was then a married woman—Her husband disposed of the property.—The complainants, who were the children of the donee, contended that their grandfather intended to give a separate estate to their mother, not subject to the debts or disposition of her husband. The Court of Appeals determined, that "the property in dispute being given to the mother of the complainants after marriage, it may be fairly inferred from the words of

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the deed, that the intention of the father, the donor, was to give to her a separate estate, which her husband had no right to dispose of, in any manner." What the "words of the deed" were, the report nowhere informs us, and the learned reporter, in his head note, leaves it very clearly to be inferred, that the fact of the daughter being a married woman at the time of the gift, sufficiently indicated the father's intention to vest in her an estate to her separate use, yet the decree could not have been influenced by that consideration—if it was, it may at least claim the merit of novelty, while it stands unsupported and insupportable.

A distinction has been often taken between a gift or bequest to a married woman, and a gift or bequest to one who is unmarried, unless it is made in contemplation of an immediate marriage, and with a view to a provision for that event. In the case of the unmarried woman, much stronger terms are required to indicate the intention of the donor or testator to continue a distinct interest in herself, after she shall come under the protection and control of a husband. If the terms employed are, that the property shall be "at her own disposal," or "for her sole and her separate use," the property would vest absolutely in her as owner, and upon marriage, would not be holden otherwise than as her other absolute estate; but would be subject to the marital rights of the husband—(2 Story's Equity, 610, 611, and cases there cited.)

In the case at bar, we have cited quite a number of authorities, not because we have thought it necessary to the understanding of the principle of our opinion, but

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that the course of judicial decision upon this interesting question should be seen. There is not the slightest indication of intention in either of the deeds of Alexander Lamb, that his daughter should hold the slaves at her own disposal, or for her own use, and as her separate property; nor are there any terms to be found in either of them, which would inhibit the husband from disposing of the slaves, against the consent of the wife. The husband, then, must be taken to have acquired an estate for the life of his wife, in the slaves in controversy, by virtue of the gifts to himself in trust for her, untrammelled by any right of the wife to dispose of them. The interposition of a trustee, or the fact of Mrs. Lide being married at the time of the gifts, we have shown could make no difference, and consequently the slaves are liable to levy and sale to pay the husband's debts. If there be any children of the marriage of John J. Lide and his wife, a court of equity will be open to their relief, by interposing even during the life of the mother, to prevent a removal of the slaves, so as to put in jeopardy the enjoyment of their eventual interest.

Our conclusion on this question is decisive of the case, and relieves us from considering the other points presented by the bill of exceptions. The judgment is affirmed.

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1. Personal contracts are to have the same obligation, force, validity and interpretation in every country, which they have in the country where they are made or are to be executed.
2. (But the courts of no country are bound to enforce or hold valid, any contract injurious to its own rights, or those of its citizens; or which offends public morals, or violates public faith.)
3. Remedies for the enforcement of contracts, or to obtain compensation for a breach, are to be regulated and pursued according to the *lex fori*, and not the law of the place where they are made or are to be executed.
4. The nature, validity, construction and effect of contracts, are to be ascertained by the *lex loci contractus*, and that law is considered as much a part of the contract, as if it were expressly inserted in it.
5. Statutes prescribing the time within which courts shall entertain certain actions, relate to the *remedy*, and a party seeking that *remedy*, must bring himself within the prescription, as limited by the *lex fori*.
6. (A plea of prescription affirmed by a judgment, operates as an answer to the right of action every where.)
7. The discharge of a contract, or a defence against it, in the place where it is made, is available every where.
8. The *legal* obligation of a contract is discharged, whenever the statute of limitations of the place where it was made, has run against it, and nothing remains, but a moral duty, which courts of judicature cannot coerce.
9. *It seems*, that if the *legal* right be gone, the contract is discharged, until it is re-affirmed, or in some manner recognized.
10. Prescription constituting a bar at the place of the contract, operates as a defence *extra territorium*—therefore,

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11. Where one made a note in South Carolina, and remained in that State until the statute of limitations of South Carolina operated as a bar to a recovery on the note,—it was held that the bar created by the law of South Carolina, operated as an available defence to an action brought on the note in this State.

Error to the Circuit court of Mobile.

Assumpsit on a promissory note, tried before *Pickens, J.*

Plaintiff declared against defendant on a promissory note, to which defendant plead, that the note was made in South Carolina, and that defendant was a citizen of that State, more than four years after cause of action accrued on the note, and that by the law of South Carolina, all actions on any writing not a specialty, must be brought in four years, and not afterwards; and further that no action was commenced in that State within four years after the right of action accrued on the note, and that he did not promise within four years next after the right of action accrued, to pay the note.

To this plea, there was a demurrer and joinder.

The court sustained the demurrer, and judgment was rendered for plaintiff; to reverse which the writ of error was brought.

Upon the trial of the cause, the plaintiff gave in evidence a note, of which the following is a copy:

“Charleston, 31 May, (1825,) eighteen hundred and twenty-five. Four months after date, I promise to pay to the order of J. C. & C. Burckmeyer, seven hundred and nine 55-100 dollars, for value received.

(Signed,)

DUKE GOODMAN, per Att’y,

JAMES A. MILLER.”

It was further in proof, that the note was executed in Charleston, in the State of South Carolina; and that the

interest which such contracts bore in that State, was seven per centum per annum.

Plaintiff in error assigned:

That the court erred in sustaining the demurrer to defendant's plea.

Campbell, for the plaintiff in error.

Stewart, contra.

COLLIER, C. J.—The only question raised in this case is, whether, if persons residing in the same state, enter into a contract, in consideration of which, one stipulates by promissory note, to pay the other a sum of money at a particular day, and the promissor continues his residence within the state, until the statute of limitations of the *locus contractus* shall have operated a bar to a recovery,—can the maker of the note, who has removed to another state, when sued, avail himself of the prescription of the *lex loci contractus*, or shall the *lex fori*, in this particular, govern?

It is well settled, that personal contracts are to have the same obligatory force, validity, and interpretation in every other country, which they have in the country where they are made or are to be executed. This rule is of very early adoption, and recognised in all nations which cherish an enlightened jurisprudence. There is, however, an exception prevailing, coeval and co-extensive with the rule itself, viz—that the courts of no country are bound to enforce or hold valid any contract, which is injurious to its own rights or those of its citizens, or which offends public morals, or violates the

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public faith.—(De Roy, et al. vs. Crowninshield, 2 Mason's R. 151—Pearsall, et al. vs. Wright, et al, 2 Mass. R. 84—Medbury vs. Hopkins, 3 Conn. R. 472—Ruggles vs. Keeler, 3 Johns. R. 263—Andrews vs. Herriott, 4 Cowen's R. 508, and note 511, and cases there cited.)

It may also be considered an established rule of law, that remedies for the enforcement of contracts, or to obtain compensation for a breach, are to be regulated and pursued according to the *lex fori*, and not the law of the place where they are made or are to be executed. This rule rests upon clear and intelligible reasoning. Every nation institutes its own courts, prescribes their jurisdiction, and the time and manner of proceeding, with a reference to its own views of justice and propriety—its wants and usages, and the convenience of its citizens. All that international comity can claim under such circumstances is, that foreigners shall be entitled to the same judicial remedies as are afforded to citizens of the country.—(Cases cited above—Decouche vs. Savatier, 3 Johns. Ch. R. 190, 217—4 Cowen's R. 528, note, and cases there cited.)

In regard to the nature, validity, construction, and effect of contracts, as these are to be ascertained by the *lex loci contractus*, that law is to be considered as much a part of the contract, as if it were expressly inserted in it.—(Melan vs. The Duke de Fitzjames, 1 Bos. & Pul. 138—Mather & Strong vs. Bush, 16 Johns. R. 233.)

But while these general rules are acknowledged, their application, in the great variety of cases that arise, is often perplexing and difficult. The distinction between *construction* and *right*, on the one hand, and *remedy* on

the other, seem occasionally so refined as to run into each other.

That statutes, prescribing the time within which courts shall entertain certain actions, or contracts be sued, and wrongs redressed, relate to the *remedy*, and consequently, a party seeking that *remedy*, must bring himself within the prescription as limited by the *lex fori*, is a proposition which we need not gainsay.—(4 Cowen's R. 528, cases cited in note.)

While we admit authority thus to have settled the rule, where no statute has attached upon the cause of action, and perfected a bar—for *myself*, I am free to admit, that if this question were *res integra*, I should be apt to consider the limitation of the *lex loci*, as entering into and forming a part of the contract. The maker of a note must be supposed to have in view the prescription of the country where it is made, or to be paid, and to stipulate in reference to it, in the same manner as if it had been inserted in *hæc verba*—(Nash vs. Tupper, 1 Caines's R. 402—argument for plaintiff, and dissenting opinion of Mr. Justice Livingston.) This, however, is a mere intimation of what *my* opinion would be, in the absence of prior adjudication: the rule, qualified as we have stated it, rests upon authorities too numerous and respectable to be disregarded—and I acquiesce.

The question, whether the prescription of the place of the contract having completely run against the plaintiff, and extinguished his remedy there, we think may be considered independent of the influence exerted by statutes of limitation before the bar is perfected. The *locus contractus* is the place for the performance of a contract,

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if it contemplate no other, and if its execution cannot there be coerced by reason of the supineness of the party entitled to its benefit, shall the courts of another country acknowledge its validity? The statute of South Carolina, so far as we can learn its terms from the plea, does not declare an extinction of the contract, but an extinguishment of the remedy only; yet we cannot conceive that this should materially influence its legal effect. The distinction between a *right* and a *remedy*, is well known in law—the former is dependent upon the stipulations of the parties, or their acts or omissions, while the latter is subject to legislative modification. Though the legislature be necessarily vested with this power, it cannot, under the pretence of modifying, abolish a remedy. A contract which cannot be enforced, though free from all objection to its validity, has no obligation in law: it is true, that there may be a moral obligation, binding *in foro conscientia*, but of this, courts of judicature can take no notice, except as furnishing an adequate consideration for a promise, or a sufficient authority to retain money paid on such inoperative contract. It is difficult to distinguish in principle, between a contract which has become extinct by the passiveness of him in whose favor it was made, and one, the *remedy* on which, has been lost from the same cause. In the one case, it is as if it had never existed—in the other, the *legal* obligation being gone, it cannot be coerced, but depends for its performance upon the sense of moral justice of the party originally liable—(2 Mason's R. 168, 169; Sturgis vs. Crowninshield, 4 Wheat. R. 122, *et post*; Smith vs. Mead, 3 Conn. R. 253; Hammet vs. Anderson, Ib. 304.)

A defendant may or may not, at his election, plead the statute of limitations; yet, if he does, and it is found in his favor, it cannot be successfully urged that the defence shall not avail him every where. The plea is in bar, and not in abatement, and a judgment for the defendant would not merely defeat the particular action, but would operate as a perpetual barrier to any other proceeding founded upon the same cause. This point we should consider clear beyond controversy, but for what was said by Chancellor Kent, in *Decouche vs. Savetier*. In that case, the learned chancellor remarked: "The plea of the statute of limitations does not touch the merits of the contract. It merely bars the remedy in the particular domestic forum, and does not conclude the plaintiff in his own or any other foreign country. To render the matter of the payment, a *res judicata*, it is necessary that the grounds of the judgment should be the same— (Graham vs. Maxwell, 2 Dow. 314.) The reason of the *exceptio rei judicatae*, is to prevent endless litigation and discordant decisions; and the reason has no application to such a plea." a/24

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Mr. Justice Livingston, in *Nash vs. Tupper*, takes a different view of the point. Speaking of a plea of the statute, he says: "The present defence is a perpetual bar to the action, and therefore involves in it the merits, and not a mere question of form." To the same effect is Mr. Justice Story's opinion in *Le Roy vs. Crowninshield*, where, treating of the effect of statutes of limitation, he observes: "If, on the other hand, they are considered as defences or bars, authorised to be made by the debtor, and at his option, they are no otherwise a regulation of

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judicial proceedings, than any other legal bar set up by the debtor. They authorise a judgment of the court in his favor, as a perpetual bar of any suit. They literally go, therefore, *ad litis decisionem*." Let these citations suffice to show that a plea of prescription, affirmed by a judgment, operates as an answer to the right of action every where.

If all remedy is gone, and the obligation of the contract, of consequence, extinct in the place where made,—shall its resuscitation be silently effected by the mere passage by the debtor, of a line which marks the boundaries of distinct governments? We are aware that there are authorities to which we are accustomed to yield a high respect, furnishing an affirmative response to this question. In *Bulger vs. Roche*, (11 Pick. R. 36,) it was held that the statute of limitations of a foreign country, cannot of itself be pleaded as a bar to an action in Massachusetts. In fact, the court considered it too well settled by its previous decisions, for the point to be again drawn in question, and that the *lex loci contractus* having operated an extinction of the remedy, would not exclude the prescription of the *lex fori*. To the same effect is *Decouche vs. Savetier*, (3 Johns. Ch. R. 319;) *Lincoln vs. Battelle*, (6 Wend. R. 475;) and *Williams vs. Jones*, (13 East's R. 439)—In which latter case Lord Ellenborough said "There was no law or authority for saying, that where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy here also."

This question is considered by Mr. Justice Story, in *Le Roy vs. Crowninshield*, with his usual research and

ability. In his opinion, the learned Judge remarks, that "payment or extinction, according to the laws of the place of the contract, is payment or extinction of the debt every where. Why not, then, the presumption of payment or extinction, conclusive every where else, when it would be conclusive at home? Why should a difference be made between the fact, and that which the law deems conclusive evidence of the fact? What is there in the principles of national comity, which forbids us to bind the parties by a rule or a prescription, which the laws of their country have made conclusive between them? If a foreign prescription may be given in evidence as proof of payment, (as in Scotland,) why may it not be pleaded directly as a positive bar?"

Again: "The statutes of limitation must be pleaded by the debtor, otherwise they are not available in his favor. The defence, in such case, is given to the debtor, against any action after the limited period. When that period is passed, if the parties are still within the State, all right of action is extinguished; and I can perceive no reason why the right to use that defence, good by his own laws, should not travel with the debtor into every other country. The policy of it is as strong as that of *exceptio rei judicatae*. It is to put an end to litigation, and to save persons from continual exposure to stale demands." And further, in speaking of a debt barred by prescription, the learned judge says, that though there may be a moral duty on the part of the debtor to pay, "there is not, strictly speaking, any right in the creditor to claim payment, for the law has made the bar, if pleaded, an estoppel of the right. Such right is technically extinguish-

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ed in contemplation of law by the presumption of extinction, until the debtor himself negatives the presumption by some act or omission. It is plain, therefore, that when the *remedy* is said to be extinguished by a prescription, and not the *right*, we are not to understand the term "right" in its technical legal sense, but merely as a moral obligation or claim in natural justice." The learned judge then says, that if the question were entirely new, and he was called on to settle it upon principle, the inclination of his mind would strongly lead him, among other propositions, to adopt the following, viz. "That where all remedies are barred or discharged by the *lex loci contractus*, and have operated on the case, there the bar may be pleaded by the debtor in a foreign tribunal, to repel any suit brought to enforce the debt. That where all remedies are barred by the *lex loci contractus*, there is a virtual extinction of the *right* in that place, which ought to be recognized in every other tribunal, as of equal validity—that if the prescription by the *lex loci contractus* be longer than that of the *lex fori*, the latter may be pleaded in bar to a foreign contract, if it applies to foreign contracts; and that this does not on principle suppose, that the foreign prescription may not also be a well founded bar to the suit." The learned judge, however, considered the question *then in judgment*, settled, so far as it could be by authorities, which the court was bound to respect. It must be observed, in that case, the law of the place of the contract had not completed a bar, before the defendant removed to another State, and though we are informed what was the opinion of the court upon principle, yet as the facts did

not render necessary a decision of the question now before us, we do not learn whether that question was supposed to be concluded by authority.

In *Woodbridge vs. Austin*, (2 Tyler's R. 364,) it was decided, that where a demand is barred by the laws of a foreign country, where the contract was made, it cannot be revived by transferring it to an inhabitant of Vermont. And in *Towns' ex'or vs. Bardwell, adm'r*, (1 Stew. & Por. 36,) Chief Justice Lipscomb, in delivering the opinion of the court, employs this language: "But in acknowledging the generality of the rule, that the statute of limitations applies to the remedy and not to the right, we wish not to be understood as committing ourselves, to sustain the rule to the full extent that has been claimed for it by some eminent jurists. We in this case only decide, that if the bar has not become perfect, the statute does not affect the right. If, however, the statute had interposed, and perfected a bar to a recovery before the parties removed from the jurisdiction where the contract was entered into, some of us, at least, would pause and hesitate much, before we would set aside that bar and open the remedy to the enforcement of the contract."

In maintaining a bar, by prescription, to be operative in every country in which the debtor may chance to be found or remove, we think the harmony of the law is best preserved. It has been held, that detinue may be maintained upon the mere ground of a previous possession, originally acquired without force or fraud, and enjoyed for a sufficient length of time to make the statute of limitations an available bar. So, it has been decided, that where possession of personal property has been ad-

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versely holden in one State, for a period beyond that prescribed by the laws of that State, and after that period has elapsed, the possessor removes into another State, which has a longer period of prescription, or is without any prescription, the original owner cannot successfully assert a title in the latter State against the possessor—(Newby's adm'r *vs.* Blakey, 3 Hen. & Munf. R. 57; Garth's ex'ors *vs.* Barksdale, 5 Munf. R. 101; Carter, et al. *vs.* Carter et al. *Ib.* 108; Travis *vs.* Claiborne, *Ib.* 435; Brent *vs.* Chapman, 5 Cranch's R. 358; Shelby et al. *vs.* Guy, 11 Wheat. R. 371; Beckford et al. *vs.* Wade, 17 Vesey's R. 88; Gregg *vs.* Bigham, 1 Hill's Rep. 299; Kegler *vs.* Mills, 2 Mar. & Yerg. R. 174; Partee *vs.* Padgett et al. 4 Yerg. R. 174; Hardeson *vs.* Hays, 4 *Ib.* 507; Thompson *vs.* Caldwell, 3 Litt. R. 136; Stanley *vs.* Earl, 5 *Ib.* 281; Cook *vs.* Wilson's adm'rs, 6 *Ib.* 437; Orr et al. *vs.* Pickett, 3 J. J. Marsh. R. 268; Middleton *vs.* Carroll, 4 J. J. Marsh. R. 143; Smart *vs.* Baugh, 3 J. J. Marsh. R. 363.) It is indeed difficult to conceive why a statute bar to the recovery of a debt should not be as potent for the debtor, as a similar prescription is for the possessor of personal property. The statutes applying to the latter case do not declare an extinction of title, but like those relating to the former, merely extinguish the *right of action*. It is, then, difficult in principle, to conceive why, if the *lex loci* is allowed as a bar in the one case, it should not be held an absolute discharge in the other. Mr. Justice Story, in his *Conflict of Laws*, intimates very clearly, that the cases are not distinguishable in principle—(page 488.)

The statutes of limitation have sometimes been assim-

ilated to laws, by which the person of an insolvent debtor is freed from a liability to imprisonment, while the obligation of the contract remains in full force against his future acquisitions. The analogy we do not think entirely just—in that case, the discharge does not extinguish every remedy of the creditor, but without pretending to interfere with the contract, it merely deprives him of one, and that the least valuable remedy. This being the case, foreign courts have refused to recognise an extinction of the remedy against the person. We think the question now before us may more aptly be likened to a discharge under the bankrupt laws of a foreign country. In that case, the certificate of the bankrupt is considered as effectual every where, as it is in the country where obtained. The *moral* obligation to pay his creditors so much of their demands as remains unpaid, is binding upon the bankrupt *in foro conscientæ*, while the *legal* right of the creditor is gone—(Potter *vs.* Brown, 5 East's R. 129; Hunter *vs.* Potts, 4 T. R. 182; Bamford *vs.* Burrell, 2 Bos. & Pul. R. 11; Matson *vs.* Medex, 1 B. & A. Rep. 121; Harley *vs.* Greenwood, 5 Ib. 95; 4 Cowen's R. 514, 515, note.) And as the statute of limitations cannot be given in evidence, so neither can a bankrupt's certificate of discharge, but it must be pleaded—(Gowland *vs.* Warren, 1 Camp. R. 363; Stedman *vs.* Martinant, 12 East's R. 664; Harris *vs.* James, 9 East's R. 82; Joseph *vs.* Orme, 2 N. Rep. 180.)

It is an undeniable principle of law, that the discharge of a contract, or a defence against it, in the place where it is made, is available every where. Thus, if infancy will avoid a contract by the *lex loci*, the same effect will

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be accorded to it wherever the contract is sued—(Thompson vs. Ketcham, 8 Johns. R. 189; Male vs. Roberts, 3 Esp. R. 163. To the same effect, see Warder vs. Arell, 2 Wash. R. 282, *et post*; Searight vs. Calbraith, 4 Dall. R. 325; Vermont Bank vs. Porter, 5 Day's R. 316; Bartsch vs. Atwater, 1 Conn. R. 409; Anon, 1 Br. Ch. R. 376.) And in Blanchard vs. Russell, (13 Mass. R. 1,) the court say, that personal contracts are subject to all the *consequences* attached to contracts of a similar nature by the laws of the country where they are made, if the contracting party is a subject or resident in that country where it is entered into, and no provision is introduced to refer it to the laws of any other country. Now, we have already shown that the *legal* obligation of a contract is discharged, whenever the statute of limitations of the place where it was made has run against it, and nothing remains but a moral duty, which courts of judicature cannot coerce. If the *legal* right be gone, it would be more proper to consider the contract as discharged until it is re-affirmed, or in some manner recognised. And prescription constituting a bar at the place of the contract, we think, should, upon principle, be regarded as a defence, *extra territorium*.

We incline to the opinion, that direct authority preponderates against the conclusion to which we have attained. But as the *precise* question now before us, does not appear to have been often considered, either in England or in the States of the Union, we do not consider precedent so overwhelming as to foreclose our enquiries. Besides, it is worthy of remark, that the more recent adjudications upon the statutes of limitation, are tending to

unsettle and overrule many of the previous decisions, which had gone far to impair and abrogate the wholesome provisions of well-intended and beneficial laws.

To conclude, we think the plaintiff's plea, which relied on the statute of South Carolina, the State in which he made the note in suit, and in which he resided until the statute completed the bar, interposed an available defence.

The Circuit court consequently erred in sustaining the defendant's demurrer to that plea, and its judgment must be reversed, and the cause remanded.

Bates *vs.* the Planters' & Merchants' Bank.

BATES *vs.* THE PLANTERS' & MERCHANTS' BANK.

1. In a summary proceeding on a Bank notice, every thing necessary to give the court jurisdiction and to sustain its judgment, must appear on the record.
2. And where the record does not shew that the certificate of the President of the Bank was produced and shewn to the court,—it has no jurisdiction, and judgment cannot be rendered.
3. Such certificate, appended to a notice to defendant attached to the transcript, is no part of the record—no action of the court appearing to have been had on it.

Error to the Circuit court of Mobile.

Bank notice, tried before *Pickens, J.*

This was a notice issued by the President of the Planters' and Merchants' Bank of Mobile, to defendant, as endorser on a note dated June twentieth, eighteen hundred and thirty-seven, for four thousand nine hundred and forty dollars, drawn by H. S. Levert, payable to defendant or order, sixty days after date, for value received, negotiable and payable at the Planters' and Merchants' Bank of Mobile, and which was protested for non-payment; informing defendant that at the next term of the court, the Bank would move against him, for the amount due by the note, with lawful damages and costs, and on the third Monday of the term, would pray the court to render judgment and award execution in favor of the Bank, for the amount of the demand. The notice was accompanied with the certificate of the President, that the note was really and *bona fide*, the property of the Bank.

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There was no plea filed, but the parties appeared, and judgment was rendered for the Bank; to reverse which, the writ of error was taken.

The record of the verdict and judgment, was as follows :

"This day came the parties, and thereupon came a jury, &c. who say they find for the plaintiffs, &c. It is therefore considered by the court, that the plaintiffs recover of the said defendant, the said sum, &c. together with the costs, by them about their motion in this behalf expended."

Campbell, for the plaintiff in error.

Stewart, contra.

ORMOND, J.—This was a summary proceeding, by motion of the Bank, against the plaintiff in error. It is now assigned for error—

1. That the record does not disclose that a motion was made in the court below ;

2. That it does not appear that the certificate of the President of the Bank was produced, showing property in the Bank ;

3. That the record does not disclose that the motion was founded on a paper on which a motion could be made.

It appears from the record, that the facts were contested before a jury, though no plea appears in the proceedings, and the judgment was entered on the verdict of a jury.

It is insisted by the counsel for the defendant in error,

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that all the facts necessary to maintain the proceeding, must be presumed to have been proved.

It has been repeatedly held in this court, that in these summary proceedings, every thing necessary to give the court jurisdiction, and to sustain its judgment, must appear on the record. Thus, in *Logwood vs. Huntsville Bank*, (Minor's Rep. 23,) the court say: "It does not appear from any thing in the record, that the notice was so given, unless the court are so to intend, as insisted by the counsel for the Bank, from the words 'duly notified,' in the record. In proceedings, according to the course of the common law, many defects in the record may be cured by the doctrine of intendment. But wherever a summary remedy is given by statute, those who wish to avail themselves of it, must be confined strictly to its provisions, and shall take nothing by intendment. The supervising court cannot infer, that notice, as required by law, has been given, unless it so appear on the record. Not to require this, would be to surrender to the court below, the power of judging without appeal, of all the proceedings had before it." The court also apply these remarks to the certificate of the President of the Bank, which the statute requires him to make, to give the court jurisdiction.

The case just cited was a judgment by default; but in the case of *Lyon vs. the State Bank*, (1 Stewart, 442,) the defendant appeared and pleaded, and on an issue tried, judgment was rendered against him, from which he took a writ of error. In giving their opinion, the court held this language: "The charter authorises the proceeding by motion, on the note and certificate, and by

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necessary implication, dispenses with special pleading, and all technicality. But it requires, by legal construction, in lieu thereof, that the record shall shew every material fact to have been proven, whether the judgment be by default or otherwise."

It was also held, in the case of *Duncan vs. the Tombeckbee Bank*, (4 Porter, 181,) that in a proceeding by motion, the filing a declaration would not render the certificate of the President of the Bank unnecessary.

Although it is the well settled law, that in summary proceedings like the present, every thing necessary to give the court jurisdiction, must appear on the record, yet we think if the question were open, it might admit of doubt, whether the rule ought not to be confined to cases of judgment by default; and whether, where the parties appeared, pleaded, and contested the matter, the same rules did not apply in suits prosecuted in the ordinary mode. The decisions have been so long acquiesced in, establishing the contrary doctrine, that we do not feel now authorised to disturb them.

We do not think, however, that any decision heretofore made, applies to the case now before us, in regard to the notice. The object of the notice is to inform the opposite party of the motion to be made against him: if he appear and plead, it must certainly be held an admission of notice. The same remarks apply to the objection, that no motion was made. The record discloses that an issue was tried: this could not be on any thing but the motion, which must have been made, though it was not formally entered on the record.

But the objection, that the record does not shew that

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the certificate of the president was produced, must be sustained. It is no where stated that the certificate of the president was produced and shewn to the court, and without this the court had no jurisdiction. It is true that a paper purporting to be a certificate is found appended to a notice sent up with the transcript, but that is no part of the record. No action of the court appears ever to have been had upon it, without which it cannot be considered as part of the record.

The judgment of the court be reversed, and the cause remanded.

Leverett vs. the Planters' and Merchants' Bank.

LEVERT vs. THE PLANTERS' & MERCHANTS' BANK.

1. The charter of the Planters' and Merchants' Bank of Mobile, does not give the right to the Bank, to recover on notes or bills held by them, unless such notes and bills are made negotiable and payable at that particular Bank.
2. And in such cases, the record must shew that the note or bill on which the remedy is sought, was made payable and negotiable at the Bank.
3. The notice issued to defendant, and attached to the transcript, is not considered as part of the record,—so as to shew the right of the Bank to recover judgment on motion.
4. The act of the thirtieth June, eighteen hundred and thirty-seven, gives the remedy, by motion, to the Bank, only on notes and bills, the future acquisition of the Banks.
5. The remedy by motion, being in derogation of the common law, cannot be inferred, unless the party claiming the benefit of it, shews affirmatively, that he is entitled to it.

Error to the Circuit court of Mobile.

Bank notice, tried before *Pickens*, J.

The notice, in this case, was issued on a note dated June twentieth, eighteen hundred and thirty-seven, payable sixty days after date, to Joseph Bates, jr. or order, for four thousand nine hundred and forty dollars, for value received, negotiable and payable at the Planters' and Merchants' Bank of Mobile, and endorsed by the payee.

The notice stated that the note was the property of the Bank—was past due—was not paid according to the tenor and effect thereof, and was protested for non-pay-

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ment: and that the Bank would move against defendant, for the amount due by said note, with lawful damages and costs, at the next term of the Circuit court, and on the third Monday of said term, would pray the court to render judgment, and award execution in favor of said Bank for the amount of said demand. To the notice was attached the certificate of the President, that the debt was the *bona fide* property of the Bank. The notice was served thirty days before court.

Judgment was rendered against defendant by *nil dicit*, and the case brought up for revision.

Plaintiff in error assigned:

1. That the facts stated in the record do not shew a case in which a judgment could be rendered on motion;
2. That upon the facts stated in the record, judgment should have been given for the plaintiff in error in the court below.

Campbell, for the plaintiff in error.

Stewart, contra.

ORMOND, J.—This was a motion by the defendants in error against the plaintiff in error, for a judgment on a note discounted by the bank.

The judgment was rendered by default, and it is now objected here, that the record does not shew a case in which a judgment could be rendered in favor of the bank, on motion, because it does not state that the note was negotiable and payable at that bank.

The charter of the bank provides "That if any person shall be indebted to said corporation, as maker or

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endorser of any note, bill or bond, expressly made *negotiable and payable at said bank*, and shall delay payment thereof, it shall be lawful for said corporation, after having given at least thirty days notice thereof, and producing to the court before whom the motion is made, the certificate of the President of the bank, that the debt is really and *bona fide* the property of the bank, to move for judgment and award of execution," &c.

The statement on the record is, that the plaintiff "moved the court for a judgment in this case, for the amount of a promissory note signed by defendant, dated June twentieth, eighteen hundred and thirty-seven, payable sixty days after date, to one Joseph Bates, jr. or order, and by him endorsed for the sum of four thousand nine hundred and forty dollars, which note was discounted at said bank," &c. There is no other description or proof relating to the note than this, except in the notice attached to the transcript, which cannot be considered as was determined in the case of Bates vs. the Planters' & Merchants' Bank, at this term; and according to the principles determined in that case, and the previous decisions of this court, it is not sufficient. The record does not shew that the note was made payable and negotiable at the Planters' & Merchants' Bank, and this court cannot intend that it was thus made. If not made negotiable and payable at that particular bank, the charter did not give the right to recover on it by motion.

It is, however, insisted, that an act passed on the thirtieth of June, eighteen hundred and thirty-seven, covers the case. The act provided, that "if any person shall become indebted to any of said institutions," (including

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this bank,) "by bill, bond, note, or other contract, for the payment of money, and shall delay payment thereof, the said banks may sue for and collect the same by summary remedy, as in other cases under the charter of said banks."

Giving to this act a just interpretation, it would seem very clear that it contemplated to give this remedy only to the future acquisitions of the banks. It does not appear when the bank acquired property in the note; and it is just as likely to have been before the passage of the act, as afterwards. But the right of the bank to this summary remedy cannot be maintained by the inference, that it might not have obtained property in the note, until after the thirtieth of June, eighteen hundred and thirty-seven. The note bears date on the twentieth of June, eighteen hundred and thirty-seven, and if acquired before the thirtieth of June, was a debt, though not payable until a future day. The remedy being in derogation of the common law, cannot be enforced, unless the party claiming the benefit of it, shows affirmatively on the record that he is entitled to it.

That not being done in this case, the judgment must be reversed and the cause remanded.

Inge vs, the Branch Bank of Mobile.

INGE vs. THE BRANCH BANK OF MOBILE.

1. Where A endorses a bill of exchange in blank, with an understanding that it is to be accepted by B, and this understanding is communicated to C, who purchases the bill, before the purchase; and the bill is not accepted by B, but by some other person:—A, the endorser, is not liable on his endorsement, to C, the holder.
2. The acceptor of a bill is primarily liable to pay the bill, and the drawer and endorser, if the proper steps are taken to charge them, are liable on the default of the acceptor—but the endorser is liable in no instance to the acceptor, unless in case of an acceptance for the honor of the endorser.
3. Where a creditor, without the consent of a surety, makes a valid agreement with the principal debtor to prolong the time of payment—the surety will be discharged.
4. There is no obligation to active diligence on the part of the holder in suing the acceptor, and the holder may forbear the employment of coercive measures as long as he chooses, if he does not agree to give time, so as to suspend his remedy against the acceptor, to the prejudice of the parties who are secondarily liable.
5. But an agreement between the holder of a bill and the acceptor, that the holder will not look to the acceptor for payment of the bill, until the holder has exhausted, without success, the legal remedies against the endorser, will operate to discharge the endorser.

Error to the Circuit court of Mobile.

Bank notice, against the endorser of a bill of exchange, tried before *Pickens*, J.

Plea, *non-assumpsit*. Verdict and judgment for plaintiffs.

On the trial of the case, the plaintiffs read in evidence a bill of exchange, of which the following is a copy:

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"Exch: for \$10,000.

"1 August, 1836.

"Five months after date of this first of exchange, (second of the same tenor and date unpaid,) pay to Wm. R. Hinton, or order, ten thousand dollars, for value received, negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile, and place the same to account.

JOEL LIPSCOMB, jun.

"To *Adams & Taylor*, Mobile.

Endorsed on the back—

"*Wm. R. Hinton*,

"*R. Inge*,

"*Horner, Blocker & Co.*"

Written across the face—"Adams & Taylor."

It was originally a printed bill, with the usual blanks.

The defendant then proved by J. R. Blocker, one of the firm of Horner, Blocker & Co., that he obtained the endorsement of Inge, when the bill was in blank, except as to the drawer and endorsement of Hinton, and that it was understood at the time between himself and Inge, that the bill was to be accepted by the house of Horner, Blocker, & Co. On cross-examination, he proved that Inge endorsed the paper to enable the house of Horner, Blocker & Co. to raise funds, if desired: that there was nothing said by Inge to forbid an acceptance by others, and that the witness had not informed the plaintiffs or other persons, that it was understood by Inge, that Horner, Blocker & Co. were to accept the bill.

William J. Blocker, another partner of the house of Horner, Blocker & Co., proved, that he presented the bill

to the Bank, to be discounted for the benefit of his house, and proposed to accept the bill, which was still in blank, except as stated: that the Bank was desirous to assist Horner, Blocker & Co., but objected to discount on their acceptance: that the funds would, by their rules, go to the credit of the last endorser, and not to Horner, Blocker & Co., and proposed in order that the discount might go to their credit, that some other acceptance should be obtained, to which witness assented, but that Adams & Taylor, or the directors, or some one of them did, was not distinctly proved. On cross-examination, the witness proved that he did not state to the board, or any one, that it was the understanding of Inge, that Horner, Blocker & Co. were to accept; and that the bill was discounted, and the proceeds passed to the credit of Horner, Blocker & Co.

It was further proved, that the directors agreed with Adams & Taylor, that in case they accepted the paper, they should not be looked to by the Bank, until it should fail to make the money out of the previous parties, and that it was alone on such understanding they did accept.

It was also proved, that previous to the discount, the fact, that Inge endorsed with the understanding that Horner, Blocker & Co. were to accept, was spoken of at the board of directors, and discussed by them, but no evidence went to shew, that any party to the bill, or any one, on either of their accounts, interposed any objection to the discount of the bill, or to the acceptance.

Upon this evidence, the defendant asked the court to charge the jury, that Horner, Blocker & Co. were not responsible to Inge, as acceptors of the bill—which charge

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the court refused to give: and charged that if Inge had endorsed at the request of Blocker, and to enable Horner, Blocker & Co. to raise funds, and that they had received the discount on the bill,—this gave Inge as good a claim to recover from them, in case he had the bill to pay, as if Horner, Blocker & Co. had been acceptors.

Defendant also moved the court to charge the jury, that if the bank knew, before the bill was filled up, and before it was discounted, that Inge endorsed it in blank, to be filled up to the acceptance of Horner, Blocker & Co., and that Inge so understood the bill was to be filled up, at the time of endorsing the same, that then Inge was not responsible to the bank—which charge the court refused to give: but charged that if the bank, acting on the belief, that the endorsement of Inge was made to enable the house of Horner, Blocker & Co. to raise funds, and the acceptance of Adams & Taylor was taken to promote this object, and was not received with a view of injuring Inge, and had not done so:—then, although the bank might have been informed that Inge endorsed the bill, to be filled up to the acceptance of Horner, Blocker & Co., it did not present a legal ground against a recovery in the case.

Defendant also asked the court to charge the jury, that if the bank agreed with Adams not to look to Adams & Taylor, for payment of the bill, until the legal remedies were exhausted against the other parties, and they should fail to make the money out of them—that Inge would not be responsible—which charge the court also refused: and charged, that if to enable the proceeds of the bill to go to the credit of Horner, Blocker & Co., it were proper

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to obtain another acceptance than theirs, and it was not with a view to defraud Inge, then it was competent for the bank to stipulate with Adams, that in case he would accept, the bank would not look to him, until the legal remedies were exhausted against the other parties, without impairing the right of the bank to recover out of Inge.

1. The assignments of error were the charges given and refused;

2. That the record did not shew that defendant had thirty days notice of the matter in the Circuit court;

3. Or, that the certificate of the President was produced according to the statute;

4. Or, that the paper was one upon which a motion could be made.

Dunn, for plaintiff in error.

Gayle, contra.*

COLLIER, C. J.—The view we take of this case makes it unnecessary to consider whether the record discloses the facts essential to the regular exercise of jurisdiction upon notice and motion; besides, the law on this subject may be understood as settled by the decisions of this court—(*Duncan vs. Tombeckbee Bank*, 4 Porter's R. 181; *Bates vs. Planters' and Merchants' Bank*, and *Lea & Langdon vs. the Branch Bank at Mobile*, decided at this term.)

The questions arising upon the bill of exceptions, are:

1. If the plaintiff endorsed the bill in question, with an understanding that it should be accepted by Horner,

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Blocker & Co., and that understanding was communicated to the directory of the bank, previous to its purchase by the bank, is he liable on his endorsement?

2. Does the agreement between the directors of the bank, and Messrs. Adams & Taylor, (the acceptors,) that they should not be looked to for the payment of the bill, until the bank had exhausted, without success, the legal remedies against the other parties, operate to the discharge of the plaintiff?

1. The charge of the Circuit judge supposes that the plaintiff, with a view of enabling Messrs. Horner, Blocker & Co. to obtain money, endorsed the bill in suit, while it was blank as to its amount, time of payment and address, and entrusted it to John R. Blocker to perfect it, with the understanding that Horner, Blocker & Co. were to accept it. Taking these to have been the circumstances under which the plaintiff lent his endorsement, his agreement was to be liable as *an endorser*, if Horner, Blocker & Co. should become acceptors. He did not undertake for the punctuality of any other persons who might accept the bill, however willing he might have been to do so, had it been thought necessary to enable Messrs. Horner, Blocker & Co. to effect their purpose. But the plaintiff's liability cannot be ascertained by enquiring what he was willing to do, but the true question is, what was done by him?

In *Powell vs. Waters*, (17 Johns. Rep. 176,) the note was made with an expectation that it would be discounted at *bank*, but it was negotiated to a third person. The endorser resisted a recovery, on the ground that the note was not disposed of, as it was intended—but the

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court held that the inducement to the defendant's endorsement was to raise money for an object of which he was aware—that though it was expected to sell the note to the bank, yet there was nothing said or done to induce a belief on the part of the endorser, that if the bank declined purchasing, the note would not be put in circulation. That case bears no analogy to the present—there, it was not understood that the *bank* was the only source from which the money could be obtained—it was expected to be had there, but if the application was unsuccessful, the note might be negotiated to some one else. In the case at bar, it was understood that Horner, Blocker & Co. were to accept the bill, and if so understood by the plaintiff, it could not be put in circulation without their acceptance, but in violation of his understanding.

It is true, if the understanding between the plaintiff and Horner, Blocker & Co. was unknown to the directors of the bank at the time they discounted the bill, then it would be of no avail, and the plaintiff would be liable upon his endorsement, without reference to the circumstances under which it was obtained. It might, then, have been very well inferred by the bank, that the holder had an authority from the parties to the bill, to fill up all its blanks, and negotiate it in the usual course of business—(Chitty on Bills, 124; Putnam et al. vs. Sullivan et al. 4 Mass. R. 45.) And the plaintiff would also have been liable upon the principle, where one of two innocent persons must suffer from the act of a third person, he who has put it in the power of such third person to do the act, must be the sufferer. But if the bank had either a positive or constructive knowledge that the

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plaintiff lent his endorsement, under an agreement either expressed or understood, that Horner, Blocker & Co. were to become acceptors, the plaintiff may avail himself of the breach of that agreement, as a defence to a recovery against him—(Brown vs. Mott, 7 Johns. R. 361; Humphries vs. Blight's assignees, 4 Dall. 370.)

It is no answer to say that Horner, Blocker & Co. would still be liable to the plaintiff, if he were to pay the bill, though not as acceptor, yet for money paid to their use. The plaintiff's understanding was, that the liability of Horner, Blocker & Co. should be primary, and appear on the face of the paper. Being thus situated, it is *possible* he may have thought, that they would have been more *strongly* urged to punctuality, in order to save their credit, than they would, had their undertaking been (as it is) indirect and secondary.

It should have been left to the jury to determine whether the plaintiff's endorsement was made with an agreement, either expressed or understood, that Horner, Blocker & Co. should accept the bill, and if there was such an agreement, whether it was known to the directory of the bank before they purchased it. The existence of *both* these facts, were quite sufficient for the plaintiff's defence—and in instructing the jury that if it was not intended to injure the plaintiff, and if he was not in fact injured, he was still liable, the judge of the Circuit court mistook the law.

2. A bill of exchange has usually three parties—the drawer—the drawee, (who after acceptance is the acceptor,) and the payee, (after endorsement the endorser)—(Chitty on Bills, 1, 19.) The acceptor is primarily liable

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to pay the bill, and the drawer and endorser, if the proper steps are taken to charge them, are liable on his default—(Ibid. 182, 183.) And in no instance is the endorser under any liability to the acceptor, unless it be in the case of an acceptance for his honor—(Ibid. 142.)

With a view to the solution of this question, Adams & Taylor must be considered as having become acceptors, with the knowledge and assent of the plaintiff, and the plaintiff be regarded in the nature of a surety for the performance of their engagement.—(Ibid. 292—and Theobald on Prin. & Surety, 180, *et post.*)

It is a well established rule, and repeatedly recognised in this court, that if the creditor, without the consent of the surety, make a valid agreement with the principal debtor, to prolong the time of payment, the surety will be discharged.—(Pyke vs. Searcy, *et. al.* 4th Porter, 61, and cases there cited.) It is said there are two points of view in which, agreeing to give time to an acceptor, will discharge the indorser. According to the one, the creditor, in prolonging the day of payment, is considered as having disintituled himself to proceed against the acceptor, until the time agreed to be given, has expired. Such an agreement is inconsistent with the obligation of a creditor to sue the principal debtor, at any moment when required by the surety to do so; and the creditors, voluntary disablement of himself for the performance of any obligation which he is under to the surety, discharges the latter. According to the other, the creditor is regarded as having, in point of good faith towards the debtor, obliged himself not to proceed against the surety; because if he were to proceed against the sure-

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ty, and the surety to pay, the surety would be instantly entitled to his remedy against the debtor; and so, through the *medium* of the surety he would deprive the debtor of the time he had agreed to give him—and therefore, to preserve good faith, he will not be allowed to proceed against the surety.—(English vs. Darley, 2 Bos. & Pul. 61—Boulton vs. Stubbins, 18 Ves. R. 20—Maltby vs. Carstairs, 1 M. & R. 562, note—Bowmaker vs. Moore, 3 Price, 214—See also, Theobald on Prin. & Surety, 123, *et post*, and 180 *et post*—Chitty on Bills, 289, *et post*.)

There is certainly no obligation to *active diligence* on the part of the holder in suing the acceptor, and he may forbear the employment of coercive measures as long as he chooses, if he does not agree to give time so as to suspend his remedy against the acceptor, to the prejudice of the parties who are secondarily liable. And whether, in giving time to the principal, a creditor may reserve the right to sue the surety in the *interim*, is a question, touching which, there is not entire harmony in judicial decision, and as it does not necessarily arise, we decline its examination.

As the record does not discover any objection to the legal validity of the agreement between the directory of the Bank and Adams & Taylor, or of the evidence by which it was shown, we must intend that both the proof and agreement were unexceptionable; the more especially as the Judge, in his charge, does not notice any objection to either.

The record then, discloses that the directory of the Bank agreed with Adams & Taylor that they would not look to them for payment, until the legal remedies a-

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gainst the other parties had been exhausted, without affecting a collection. True, the agreement not to sue, was for no definite period, yet the remedy of the Bank against the acceptors was necessarily suspended for six months, for it would have required that length of time (at the least) after the maturity of the bill, to have obtained judgments and had executions issued against the drawer and endorsers. The agreement then, brings the case clearly within the principle of the rule we have stated—and upon both grounds, the judgment must be reversed, and the cause remanded.

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LEA & LANGDON vs. THE BRANCH BANK AT MOBILE.

1. A legal title to a note, payable to the order of the maker, can only be derived from his endorsement.
2. Such note is of no validity until endorsed; and until then, the maker cannot be sued.
3. But when endorsed, the note becomes perfect, and the party may be treated as the maker.
4. And if a subsequent endorser be sued, the holder may derive title to the paper, through the endorsement of the maker.
5. The Bank cannot, as endorsee of defendant, maintain a proceeding against one (not the maker) as the endorser of a note, made payable to the order of the maker.
6. And the certificate of the President of the Bank, that the paper sued on is really and *bona fide*, the property of the Bank, will not of itself, give title to the Bank, of the paper sued on.
7. The Legislature, in requiring such certificate, did not intend a grant of power—only a limitation on a power already given.
8. On a demurrer to evidence, where the evidence is not sufficient to maintain the issue,—the court will not award a *venire facias de novo*.

[The case of Ramsey vs. Johnson, (Minor's Reports, 418,) is overruled, by the decision in this case.]

Bank notice, tried before *Pickens, J.*

On the second day of December, eighteen hundred and thirty-seven, a notice was served on the plaintiffs in error, informing them that at the then next term of the Circuit court of Mobile, to be held on the second after the

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fourth Monday in October, the President of the Bank would move for judgment against plaintiffs in error, as the endorsers of a promissory note, expressly made payable and negotiable at the said Bank, which note bore date the first day of October, eighteen hundred and thirty-six, being made by A. Marvin as maker, payable three months after date, to the order of said A. Marvin, for the sum of six hundred dollars, and protested for non-payment.

Attached to the notice, there was the following certificate:

"I, George S. Gaines, President of the Branch of the Bank of the State of Alabama, at Mobile, do hereby certify, that the note described in the foregoing notice, was, when the same was protested, and now is, really and *bona fide*, the property of said Branch Bank.

"Given under my hand this 2d day of January, 1838.

"GEORGE S. GAINES."

To this notice, the defendants below filed a plea, in the nature of *nil debit*.

The plaintiffs below, to sustain their issue, introduced a note, of which the following is a copy :

"Dollars 600.

Mobile, October 1, 1836.

"Three months after date, I promise to pay to my own order, six hundred dollars, for value received, negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile.

"A. MARVIN."

The said plaintiff produced in evidence the protest of a notary, by which it appeared, that the payment of said money was demanded at the maturity of the said

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the said note, at the place where the same was made payable; and refused: whereupon, the note was protested for non-payment, and notice given to defendants. It further appeared, that the defendants had received thirty days' notice of the motion; and it was shown, by the production of the certificate of the President of the Bank, that the said paper belonged to the Bank.

The defendants admitted that the note was executed by A. Marvin: that their indorsement appeared thereon, and that they had received due notice of non-payment. They also conceded, that the debt was really and *bona fide* the property of the Bank; but demurred to the evidence.

Annexed to the demurrer, there was a statement, that the plaintiffs offered to prove that the note in evidence was endorsed by Aaron Marvin, which evidence was not permitted to go to the jury.

The demurrer was ruled by the court, not sufficient in law, to bar plaintiffs' action, and judgment was therefore given against the defendants, on which they took a writ of error.

The plaintiffs in error assigned—

1. That the demurrer to the notice of the plaintiffs was overruled in the court below.

2. That the record does not disclose a case in which a motion ought to have been made or judgment rendered upon a motion against defendants.

3. That judgment was rendered for plaintiffs below on the demurrer to evidence, when the same should have been rendered for defendants.

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4. That the court rendered judgment for damages, when the same ought to have been assessed by a jury.

Campbell, for the plaintiff in error.

Gayle, contra.

ORMOND, J.—The question presented to this court is, whether the plaintiffs below have such a title to the note as would enable them to maintain this action. The note being payable to the order of the maker, the legal title to it could only be derived from his endorsement. This endorsement being excluded from the jury, can the action be maintained?

It is maintained that the certificate of the President of the Bank, that the paper sued on is *bona fide* the property of the Bank, will authorise the maintenance of a suit in a case like the present. It is apparent that the legislature had no such intention. It was not intended as a grant of power, but as a limitation on a power already granted, and to prevent the Bank from being used as an instrument for the speedy collection of debts, which did not belong to it.

The question then is, whether the Bank can maintain a suit at law, without having a legal title to the instrument sued on. No part of the charter has been referred to, as containing this power, except the one above adverted to: As it is shown that that clause does not give the power, and as the law is not controverted, that neither a corporation nor an individual can maintain an action at law, to recover a chose in action, it follows that the Bank could not sue, at law, in its own name, either

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by this summary process, or otherwise, unless it had a legal title to the instrument sued on. The court, therefore, erred in overruling the demurrer.

It is, however, insisted, that this court can not render judgment for the plaintiffs in error, but must remand the cause, that a *venire facias, de novo*, may issue.

On a demurrer to evidence, the only enquiry that can be made by the court is, whether the evidence does or does not sustain the issue, and judgment must be rendered accordingly. It is true that when the evidence is so loose and uncertain that no correct conclusion can be attained, the court will award a *venire facias de novo*.

In the case of Gibson and Johnson *vs.* Hunter, (2 H. Blackstone, 209,) Lord Chief Justice Eyre, delivering the opinion of all the Judges, says—"In case no judgment can be given, what ought to be awarded? We answer that there ought to be an award of a *venire facias de novo* :—the issue joined between these parties, in effect, has not been tried; and the case of Wright *vs.* Pindar, is expressly in point, that another *venire facias* should issue."

So, in the case of Wheelwright *vs.* Moore, (1 Hall's Sup. C. Rep.) Judge Oakley delivering the opinion of the court, says—"When there is a demurrer to evidence, which is certain, as in the case of documentary proof, the practice is for the court to give final judgment, as on a special verdict; but where there is no certainty in the statement of facts proved, the court may award a *venire de novo*. In the present instance, it is evident that the whole merits of the plaintiff's case have not been disclosed, and I think it is competent for us, in the exercise of our dis-

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cretion, to send the case to another trial. The purposes of justice would not be subserved by giving a peremptory judgment on this record."

Here, there is no uncertainty. The evidence is not sufficient to maintain the issue, unless we hold that the Bank can maintain the action, without having the legal title. For what purpose then should we award a *venire de novo*. But no such result can take place.

It is also insisted that no action can be maintained on the note in this case, as it was payable to the order of Marvin, the maker of the note.

Under the act of eighteen hundred and twelve, an endorser is authorised, after assignment, to maintain any action against the maker, which the payee could have maintained, and he is authorised to sue the endorser as in cases of inland bills of exchange.

When one makes a note payable to his own order, it is of no validity until endorsed, and until then he could not be sued; but by the indorsement, the instrument becomes perfect. If he alone is to be sued on it, he can be treated as the maker of a promissory note. (See *Roach vs. Ostler*—1 Manning & Ryland, 120.) If any subsequent indorser is sued, the holder may derive his title to the paper through the indorsement of the person making the note payable to his own order. (See *Chit. on Bills*, 25—*Smith vs. Luske*, 5 Cowen, 708—*Cooper vs. Meyers*, 10 Barnwell & Cresswell, 468—*Hazlehurst vs. Pope*, 5 Stewart & Porter, 197.)

The case of *Tindall vs. Bright*, (1 Ala. Rep. 103,) has been supposed to militate against this doctrine; but this point does not arise in that case. The point there de-

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terminated is, that no action can be maintained at law, where one of several co-obligors is also an obligee in the bond.

The case of Ramsey vs. Johnson, (Minor's Rep. 419,) is in conflict with the decision here made, and in the case cited from 5th Stewart & Porter; and is to be considered hereafter as overruled.

The judgment of the Circuit Court is reversed, and judgment entered here for the plaintiffs in error.

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1. Notice by an indorser, who has paid a bill of exchange in Bank, that he will move for judgment against his principal, at the next term of the court, loses its efficacy, by a failure to proceed on it at the term fixed for its return.
2. Such a notice is entirely under the control of the party issuing it, until he shall move upon it, and can not be regarded as *process, matter or thing depending*; and consequently is not continued in force by the statutes, which provide for cases of failure to hold a court, or dispose of the business therein.

Error to the County court of Montgomery.

Notice by an indorser who had paid a bill of exchange, to his principal, that a motion would be made for judgment.

The defendants, as the indorsers of a bill of exchange, negotiated at the Branch Bank at Montgomery, having paid the same, gave notice to the plaintiffs that they would move the County court of Montgomery, to be

holden on the first Monday in December, eighteen hundred and thirty-seven, for a judgment against them as drawers, according to the statute. The first proceeding upon the notice, was at a special term of that court, holden in February, eighteen hundred and thirty-eight, when a motion was made for a judgment, which was resisted on the ground, that the motion should have been submitted at the December term; but the objection being deemed insufficient, the motion proceeded to judgment; and to revise the proceedings below, the case was brought up by writ of error.

It was assigned for error—

1. That the evidence in the court below, did not support the judgment, or authorise the same.
2. The plaintiff below was not entitled to proceed against the defendant, in the summary method pursued.
3. The case was not regularly in court, and should have been dismissed on the motion made; and the judgment *nunc pro tunc*, should not have been rendered.

Thorington, for plaintiff in error.

COLLIER, C. J.—The judgment of the County court can not be sustained; for the notice to appear in December had lost its efficacy, by a failure to proceed on it, at the term fixed for its return. The statute directs that “all process, matters and things depending, shall be continued, and all appearances upon returns of process shall be made to the next succeeding term in course, &c. in the event of a failure to hold a County court, or to dispose of all the business therein.”—(Aik. Dig. sec. 15, p.

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248.) The act under the authority of which, the special court was holden, was passed on the twenty-third of December, eighteen hundred and thirty-seven, and enacted, that all judgments and other proceedings, had at that time, should be as valid and binding in law, as if they had been at a regular term. A notice issued by a *party himself*, (as was that in the present case,) is entirely under the control of the party issuing it, until he shall move upon it : he may, until then, destroy it, if he think proper, or entirely abandon it, without subjecting himself to a judgment for costs. The notice, in the hands of the party, can not be regarded as *process, matter or thing* depending, and consequently is not continued in force by virtue of either of the statutes cited, upon the failure to hold a court or dispose of the business therein.

The judgment at February, then, was unauthorised by the notice, and must consequently be reversed. The other points made at the argument, (as the case can not be remanded,) need not be considered.

SMITH vs. BLAKENEY.

1. Where an action is brought against two defendants, and the writ is served on one only, and the plaintiff discontinues as to the defendant not served—he may, immediately after the discontinuance, issue fresh process against the defendant not served, and if he be found, proceed to judgment against him.
2. And the recitals in the writ, that a previous writ had issued against the defendant, and the party as to whom the judgment was taken—will not avail in error—the defendant having appeared.

Assumpsit upon a note signed "G. F. Davis, A. K. Smith."

On the fifteenth of July, eighteen hundred and thirty-six, the writ issued against Davis and Smith, returnable to the July term following of the County court. The writ was returned, executed on Davis alone, and the declaration was against him, discontinuing as to Smith.

At January term, eighteen hundred and thirty-seven, judgment on verdict was rendered against Davis, reciting dismissal as to Smith.

On the twenty-first December, eighteen hundred and thirty-six, an *alias* writ, founded on the original served on Davis, was issued against Smith; and on the twenty-seventh March, eighteen hundred and thirty-seven, a *pluries* issued, which was executed eleventh April, eighteen hundred and thirty-seven.

At January term, a declaration was again filed against Smith, and judgment rendered by *nil dicit*.

Smith vs. Blakeney.

First. It was assigned for error, that the court erred in rendering judgment against plaintiff in error.

1st. Because a discontinuance was entered in the original declaration against the plaintiff in error, against whom writ was issued jointly with Davis.

2d. Because the case was continued against Davis, and judgment entered against him, dismissing the case as to plaintiff in error.

3d. Because the judgment was taken against plaintiff in error, upon a *pluries* writ issued *after* judgment had been obtained on the original writ against Davis.

Second.—The court erred in refusing to quash the writ in this case, on which judgment was obtained.

1st. Because it was a *pluries* writ, issued *after* judgment, on the original, against another defendant.

2d. Because the case had been previously discontinued against plaintiff in error.

Porter, for the plaintiff in error.

Phillips, contra.

PER CURIAM.—Some difficulty is thrown around this case, from the manner in which the record is presented.

An original writ issued against Smith, the plaintiff in error, and one Davis, which was served on Davis, against whom a declaration was filed—on which, the suit, as to Smith, (who was not served with process) is discontinued. Judgment was rendered, on verdict, against Davis. Previous to the judgment against Davis, and after the discontinuance against Smith, a writ is issued, reciting the issuance of the previous writ, against both,

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and that it was not served on Smith. After the judgment against Davis, another writ is issued against Smith, which being served on him, and a declaration filed, he appears and moves the court to quash the writ, as founded on a proceeding previously discontinued. This motion was denied, and judgment rendered against him at a subsequent term. All of the proceedings against Davis are irregularly entered in the transcript as a part of the record of this suit : when these are stricken out, there will appear only the writs and proceedings against Smith, and the recitals of a previous writ having been issued against him and Davis, is not such a defect as can be available to him.

As soon as the action was discontinued in the court below, the plaintiff in that court had the right to sue out process against Smith, and the recital of the former writ can not vitiate the subsequent process.

Let the judgment be affirmed.

PERINE et al. vs. BABCOCK.

1. In a proceeding to try the right of property levied on under an attachment, the court cannot reject an execution (or it would seem, the attachment) offered in evidence, on the ground that the lien of the attachment was destroyed by the giving of a replevy bond.

Error to the Circuit court of Dallas.

Issue to try the right of property, tried before *Crenshaw, J.*

Verdict and judgment for the claimant.

In this case, the bill of exceptions stated, that on the trial of the cause, the plaintiffs in execution, produced and proved the issuance of an attachment by them, on the thirtieth March, eighteen hundred and thirty-two, against the estate of Stephen Miller, an absconding debtor, which was levied on the property in question. On the attachment, plaintiffs recovered judgment. They also proved by several witnesses, that the property was in Miller's possession for several years, and up to the time of his absconding. They then offered in evidence an *execution* issued upon their judgment, which was levied on the same property, on which levy, claimant again interposed his claim, and executed bond for the trial of the right of property. To the introduction of this last evidence, claimant objected, on the ground, that a replevin bond had been executed by him, on the thirtieth March, eighteen hundred and thirty-two, for the property. The objection was sustained by the court, on the ground, that the lien created by the levy of the attach-

ment, was discharged by the execution of the bond. Whereupon, the plaintiffs in execution submitted to a verdict for claimant, and excepted to the decision of the court.

It was assigned—

That the court erred in rejecting the execution in evidence, and in making the decision excepted to.

J. B. Clarke, for the plaintiffs in error.

Phillips, contra.

PER CURIAM.—It is evident that the rejection of the *execution* cannot be maintained on the reason assigned by the Circuit court in the bill of exceptions. If the lien of the attachment was destroyed by the execution of the replevy bond, it could in no manner affect the validity of the execution issued subsequently on the judgment, and authorise its exclusion from the jury. It must be that “execution” is inserted in the bill of exceptions, by mistake or inadvertance, in lieu of “attachment.” We notice this, not because we possess the power to correct or reform the bill of exceptions, but that injustice may not be done to the circuit judge by this presumed mistake in the question actually decided by him. If the bill of exceptions is correct, (and we must so consider it, for the purposes of reversal or affirmance,) the error is apparent.

If we consider that it was the attachment, and not the execution, which was excluded, the opinion expressed by the Circuit court is nevertheless incorrect, and though formerly a question of doubt and difficulty, was finally

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settled by the decision of the case of *McRae vs. McLean*, (2 Porter, 138.)

Since the decision of that case, the same point has received the confirmation of the Supreme court of the United States—(*Lucas vs. Hagan*, 10 Peters.) After these repeated decisions, the point may be considered at rest.

The judgment is reversed, and the cause remanded.

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- 1/ The seller of personal chattels impliedly stipulates that the article sold is his own, and that he will indemnify the buyer for the loss, if the title is in another person.
2. But a sale by an executor, administrator, or other trustee, forms an exception to the rule, and does not imply a warranty of title, unless there be fraud, or perhaps in some instances, gross negligence.
3. To entitle the purchaser to recover for any defect in the quality or soundness of the article or property sold, except under special circumstances, he must prove that the seller warranted the thing sold to be good and sound, or that he concealed or fraudulently represented its qualities.
4. If the warranty be express, it will extend to all defects, whether known or unknown, to the seller, unless they be such as a common purchaser might have observed at the time of the sale.
5. No particular form of expression is required to constitute a warranty. It generally depends upon the terms, and the sense in which they are understood by the parties, whether they amount to a warranty, or were a mere expression of the seller's opinion.

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6. It is not necessary for the indemnity of the purchaser, that he should in all cases require an express warranty, as in some cases the law will imply it ; as, in case of one who sells provisions—a merchant abroad who fills an order for his customer, and one who sells by sample.
7. A mere representation or expression of opinion, will not render the seller liable, unless made with a knowledge that they are false.
8. The purchaser of personal property cannot defend against the purchase money, by showing that the property was of no value ;—the seller making no warranty and practising no fraud.
9. A suppression of the truth also to the buyer's prejudice, will render the seller liable.
10. A contract for the sale or hire of a slave, is governed as far as the nature of the subject will allow, by the same principles that govern other contracts of sale.
11. The hirer of a slave for *a definite period*, becomes a purchaser for the *time agreed on*, and if the slave die before its expiration, the loss must be borne by the hirer, and he cannot resist a recovery, by shewing that the act of God prevented him from deriving a profit from the contract, unless by its terms, it provides for such a contingency.
12. (It seems, however, that in Virginia and South Carolina, the owner is not entitled to recover hire, for the time intervening between the death of the slave, and the expiration of the term for which he was hired, but the hire must be apportioned.)
13. (In South Carolina, a sound price, contrary to the English common law, implies a warranty of soundness, by the seller of a personal chattel.)

• Error to the Circuit court of Lauderdale.

Debt, on a note given for the hire of negroes, tried before *Lahe, J.*

The plaintiff in error, declared in debt against the defendant in the Circuit court of Lauderdale, on a writing, of which the following is a copy :

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"§348. On or before the first day of January next, we, or either of us, promise to pay Abraham Ricks, administrator of Isaac Ricks, the just and full sum of three hundred and forty eight dollars, for the hire of three negro men; namely, Dick Lockhart, Willis and Godfrey. Witness our hands and seals, this the 13th day of February, 1834.

"HARVEY DILLAHUNTY,
"AMOS JARMAN."

The defendant pleaded, *in short*—

1. A failure of consideration;
2. A want of consideration;
3. Fraud.

On each of which pleas, issues were taken and submitted to the jury.

From a bill of exceptions taken at the trial, it appeared that defendant took possession of the negroes mentioned in the note, under his contract of hiring, and that Willis died five or six weeks thereafter. It was also shown, that proof was introduced from which it appeared that Willis was unwell a few days after the hiring, and so continued up to the time of his death. It was not positively proved that he was unsound at the time he was hired, nor was it pretended that there was a warranty of soundness by the plaintiff, or that he was chargeable with fraud or deceit in the transaction.

The court charged the jury, that to sustain the plea of fraud, the defendant must prove that the plaintiff knew of the unsoundness of the negro at the time of the hiring, and concealed it from the defendant. But if it were

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shown by the evidence, that the negro was sick when he was hired, and died from a continuation thereof, a few weeks thereafter, although the plaintiff was ignorant of his sickness, yet under the plea of a failure of consideration, they must find for the defendant. If, however, the services of the negro were worth any thing, the plaintiff was entitled to recover an equivalent therefor.

The plaintiff's counsel moved the court to instruct the jury, that if there had been no breach of warranty, or no fraud, either in misrepresenting or concealing the truth in regard to Willis' health when he was hired by the defendant, in the absence of all proof that he was then unsound, or if unsound, that the plaintiff was ignorant of his condition—the defendant could not claim an abatement from his obligation to pay hire,—which instruction, the court declined giving.

Verdict and judgment for defendant, to reverse which, the writ of error was taken.

The charge given, and the refusal to charge, were assigned as erroneous.

Martin, for plaintiff in error.

Martin, for the plaintiff in error, to support the grounds taken in the assignment of error, cited—(Bl. 1, B 2, 451; 2 Porter, 280; 3 Stewart, 140; 1b. 322; 1 Stew. & Por. 71; 2 Stew. & Porter, 224.)

COLLIER, C. J.—The charge given in this case, and that refused, present the question—Whether the *unsoundness or worthlessness of a personal chattel at the time of its*

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sale, constitute a defence to an action brought for the recovery of the purchase money?

[It is understood that the seller of personal chattels impliedly stipulates that the article sold is his own, and that he will indemnify the buyer for the loss, if the title is in another person—(3 Bla. Com. 166; *Stuart vs. Wilkins*, Doug. R. 18; *Furnis vs. Leicester*, Cro. Jac. 474; *Crosse vs. Gardner*, Carth. Rep. 90; *Macbee's adm'r vs. Gardner*, 2 Har. & Gill's R. 176; *Chism vs. Woods*, Hard. R. 531; *Osgood vs. Lewis*, 2 Har. & Gill's R. 495; *Defreeze vs. Trumper*, 1 Johns. R. 274.) But a sale by an executor, administrator, or other trustee, forms an exception to the rule, and does not imply a warranty of title, unless there be fraud, or perhaps in some instances, gross negligence—(*Forsyth vs. Ellis*, 4 J. J. Marshall's R. 298; *M'Ghee vs. Ellis & Browning*, 4 Litt. R. 244; *Peter vs. Thornton*, 6 Monroe's R. 27; *Head vs. McDonald*, 7 Monroe's R. 206; 2 Kent's Com. 374.) But to entitle the purchaser to recover for any defect in the quality or soundness of the article or property sold, except under special circumstances, he must prove that the seller warranted the thing sold to be good and sound, or that he concealed or fraudulently represented its qualities—(3 Bla. Com. 164, 165; 2 Kent's Com. 374, and cases there cited; 1 Peters' C. C. R. 317; *Lowndes vs. Lane*, 2 Cox's R. 363; *Sexas vs. Woods*, 2 Caine's R. 48; *Snell vs. Morris*, 1 Johns. R. 96; *Perry vs. Aaron*, *ibid.* 129; *Defreeze vs. Trumper*, *Ibid.* 274; *Holden vs. Dakin*, 4 Johns. R. 421; *Davis vs. Meeker*, 5 *ibid.* 354, 395; *Cunningham vs. Spier*, 13 *ibid.* 392; *Fleming vs. Slocum*, 18 *ibid.* 403; *Wilson vs. Shackelford*, 4 Rand. R. 5; *Reed vs. Prentiss*, Adams' R. 174;

Lanier *vs.* Auld, 1 Murphy's R. 138; Erwin *vs.* Maxwell, 2 Murphy's R. 245; Smith *vs.* Miller, 2 Bibb's R. 616; Glascock *vs.* Wells, Cook's R. 262.) If the warranty be express, it will extend to all defects, whether known or unknown, to the seller, unless they be such as a common purchaser might have observed at the time of the sale—(Onslow *vs.* Eames, 2 Starkie's N. P. R. 81; Williams *vs.* Stafford, 8 Pick. R. 250; Sweet *vs.* Colgate, 20 Johns. R. 196; Bonekens *vs.* Berons et al. 3 Rawle's R. 32; Ex'rs of Hart *vs.* Edwards, 2 Bailey's R. 306; Watts *vs.* Mattingly, 1 Bibb's R. 244; Pile *vs.* Shannon, Hardin's R. 55; Ferrin *vs.* Taylor, 3 Cranch, 270; Butterfield *vs.* Burroughs, 1 Salk. R. 211; Margetson *vs.* Wright, 5 M. & P. 606; 7 Bingh. R. 603; 8 Bingh. R. 454.) What will constitute a warranty is not always easy to be determined. It is certain that no particular form of expression is required. It will, in general, depend upon the meaning of the terms, and the sense in which they were used or understood by the parties, whether they amount to a warranty, or are to be regarded as a representation of the seller's opinion. If a man say of property, of which he is on a treaty of sale, that he knows its qualities, and that it is free from all defects,—his affirmation, professing to be founded upon knowledge, and not opinion or belief, should be regarded as equivalent to a direct and positive warranty, and oblige him to indemnify the purchaser for all defects existing at the time of the sale, whether known to the seller or not. Upon this point, Chardelor *vs.* Lopus (Cro. Jac. 4; Dyer, 75 a.) is a leading case. There, the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone

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which he affirmed to be a bezoar stone, and sold it to the defendant for one hundred pounds, when in truth it was not a bezoar stone. The plaintiff having recovered a judgment in the King's Bench, the case was removed to the Exchequer Chamber, where all the judges but one, concurred in reversing that judgment, holding the *bare affirmation* that it was a bezoar stone, without *warranting it to be such, or fraudulently misrepresenting its character*, gave no cause of action against the seller. In *Duffee vs. Mason*, (8 Cowen's R. 25,) the seller said of a colt he was about selling—"There is nothing the matter with the colt: it is well and sound, and will make a fine horse." The court submitted it to the jury, to say whether there was a warranty, or only a mere expression of the vendor's opinion, and directed them to say how the words were understood by the parties. And to the same effect, are many of the decisions in the different States—(*Chapman vs. Murch*, 19 Johns. R. 290; *Whitney vs. Sutton*, 10 Wend. R. 413; 13 *ibid.* 277; *Cook vs. Moseley*; *Swett vs. Colgate*, 20 Johns. R. 203; *Osgood vs. Lewis*, 2 Har. & Gill, 495; *Bacon vs. Brown*, 3 Bibb's R. 35; 3 Rawle's R. 32; 7 Serg. & Rawle, 480; 10 Johns. R. 484; 4 Cowen's R. 444; See further, *Palsey vs. Freeman*, 3 T. R. 57; *Button vs. Corder*, 7 Taunt. R. 405; 1 Moore's R. 109; *Cave vs. Coleman*, 3 M. & R. 2.) It is not, however, necessary that the purchaser, in order to his indemnity, should in all cases require an express warranty. In some cases, the law will imply it. Thus, the seller of provisions tacitly agrees that they are whole-some at the time of delivery—(1 Fonblanque's Equity, N. X. 120, 121.) So, the merchant abroad, who fills an

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order for his customer residing in this country, impliedly stipulates with the purchaser, that the goods are merchantable; and one who sells by sample, undertakes that the article to be furnished, is of the quality of the sample shown—(2 Com. on Con. 263, *et post*; Hibbert vs. Shee, 1 Camp. R. 113; Germaine vs. Burton, 3 Stark. N. P. R. 32; Parker vs. Palmer, 4 B. & A. 387; Andrews vs. Kneeland, 6 Cowen's R. 354; Bradford vs. Manly, 13 Mass. R. 139; 12 Wend. R. 413, 566.)

Where there was no warranty at the time of the sale, but a mere representation, it is not enough to show that the thing sold was not such as it was represented to be; but the purchaser must go farther, and prove such a state of facts or circumstances, as fix upon the seller a knowledge that his representation was false when he made it. Where this is shown, the seller is justly chargeable with a fraud—(Smith vs. Miller, 2 Bibb's R. 616; 1 Fonblanque's Eq. Note X. 120, 121, and cases cited above.) So, if a vendor conceal the defects of property, he is chargeable on the ground of having suppressed the truth, to the buyer's prejudice—(Smith vs. Rowzee, 3 Marsh. Ky. Rep. 527; Parkinson vs. Lee, 2 East's R. 314; Jones vs. Rowden, 4 Taunt. R. 847.)

The general principles we have laid down, apply with all their force to a contract for the sale and hire of a slave, so far as the nature of the subject will allow—(Wheeler on Slavery, 107, *et post*.) The hirer of a slave for a *definite period*, becomes his purchaser for the *time agreed on*, and if he dies before its expiration, the loss of service must be borne by the hirer, who, if sued on his undertaking to the owner, cannot resist a recovery

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by showing that the act of God prevented him from deriving a profit from his contract, unless, by its terms, it provides for such a contingency—(Redding *vs.* Hall, 1 Bibb's R. 536; Harrison *vs.* Murrell, 5 Monroe's R. 359; Williams *vs.* Holcombe, 1 Caro. L. Rep. 365; and McClellan *vs.* Cook, Ala. Rep. 257.)

In Virginia and South Carolina, a different rule has been adopted. In those States, it is held that the owner is not entitled to recover hire, for the time intervening between the death of the slave and the expiration of the time for which he was hired, but in such a case, the hire must be apportioned—(George *vs.* Elliott, 2 Hen. & Mun. R. 6; Bacot *vs.* Parnell, 2 Bailey's R. 424.)

In South Carolina, it has been repeatedly adjudged, that the payment of a sound price implies a warranty of the soundness, by the seller of a personal chattel—(Timrod *vs.* Shoolbread, 1 Bay's R. 324; Rouple *vs.* McCarty, 1 Bay's R. 480; Lester *vs.* Ex'ors of Graham, 1 Const. R. 183; State *vs.* Gaillard, 2 Bay's R. 19; Barnard *vs.* Yates, 1 Nott & McC. 142; Missroon *vs.* Waldo, 2 ib. 76; Crawford *vs.* Wilson, 2 Const. R. 353.) Whatever commendation these decisions may claim from the moralist, they certainly derive no support from the English common law.

In the case at bar, the instructions to the jury maintain the principle, that it is enough for the purchaser of personal property to show that it was of no value, though the seller may have made no warranty, nor have practised a fraud upon him. In thus supposing the law to be, the Circuit court erred:—its judgment is therefore reversed, and the cause remanded.

EVANS vs. GORDON.

1. **Protest** is not necessary to enable a plaintiff to maintain an action on a promissory note, or inland bill of exchange—and where an averment of protest is made, the fact being immaterial, is not necessary to be proved.
2. Evidence that the note sued on is not the property of plaintiff, may be given under the general issue.
3. Where judgment is not rendered on a demurrer to a plea,—it will be presumed after judgment on an issue to the country, that the plea was waived.
4. The payee of a note made to him as administrator, may sue on the note in his own name, and so, also, the endorsee of a promissory note received by him as administrator, may maintain action on the note in his own name.
5. The judgment of a court, when right, will not be disturbed because rendered for a wrong reason.
6. A demand of payment of a note made payable at a particular place, is not necessary to enable the holder to maintain action, though it may be matter of defence, for the defendant, if he was ready to pay at the time and place appointed.
7. The name of a plaintiff appearing endorsed on the back of a note, does not impair his right to recover.

Error to the County court of Wilcox county.

Assumpsit on a promissory note, payable in Bank.

To an action of assumpsit, brought by the defendant in error against the plaintiff in error, as the maker of a promissory note, payable and negotiable at the Branch Bank at Mobile, to the order of Thomas Evans, and endorsed to the defendant, the plaintiff in error pleaded the

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general issue, and also that the note was not the property of the defendant in error, in his individual capacity. Issue was taken on the first plea—to the second, there was a demurrer. In the progress of the cause, a bill of exceptions was filed by the plaintiff in error.

The bill stated, that the plaintiff offered the note and protest in evidence, to which defendant objected, as the protest did not set forth, that the maker was notified of it—when the same was withdrawn. Defendant proposed to introduce a witness, to prove that the note was not the property of plaintiff in his individual capacity, but as the executor of the estate of one Alexander Gordon; but the court refused to receive the testimony, because the witness was an endorser on the note, and therefore interested in the event of the suit. Defendant then moved the court to instruct the jury, that they could not find a verdict for plaintiff, inasmuch as the protest of a notary had not been produced in evidence, setting forth, that the note had been protested for non-payment, after demand and refusal of payment at the bank: and inasmuch as it was averred, in the declaration, that the note was presented for payment at the bank, and payment refused, such presentment and refusal ought to be proved. But the court thought the averment immaterial, and not necessary to be proved, and that it was unnecessary to produce in evidence the protest of a notary public, setting forth the matters above stated, on a promissory note payable in Bank. To all of which defendant excepted.

Verdict and judgment for plaintiff—to reverse which, the writ of error was sued out.

It was assigned for error—

1. That there was no such cause of action produced in evidence, as sustained the declaration, and authorised judgment thereon.

2. The court below erred in rendering judgment upon a verdict, on an issue to the country, when an issue in law was joined on the demurrer to the second plea, which was not disposed of.

3. The court erred in giving judgment for plaintiff, he not having stricken the name of R. G. Gordon, the plaintiff, from the cause of action sued on, before judgment—he being an endorser thereof.

4. The court erred in giving and refusing the several instructions, as shewn in the bill of exceptions.

Porter, for the plaintiff in error.

Phillips, contra.

Porter, for the plaintiff in error, contended, that although the protest of such note is not essential, yet when it is averred in the declaration, it is incumbent on the party making the allegation, to prove it—(1 Selwyn's N. P. 315, note 16.) To shew that there was error, in rendering judgment upon the verdict, on an issue to the country, when an issue was pending in law, he cited, *Minor*, 93; 1 *Stewart*, 37; *ibid.* 412. There was no authority for rendering judgment, without first striking off the name of Gordon, who was an endorser—(1 Selwyn, 286, and notes C. and E.) The witness, Evans, ought not to have been excluded—(5 *Cowen*, 23, 155; 1 Selwyn, 315.) The cases cited shew that endorsements may be struck out at the trial. If they are not, the paper must

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be held to be transferred during the trial, or before—(1 Marsh. 555; Pitts vs. Keym, 1 Stewart, 155.)

Phillips, for the defendant in error. It was not necessary that the endorsee should have prosecuted the maker to insolvency, before the institution of the action against the endorser, as the note on which the suit was founded was payable in bank—(Aik. Dig. 329, 330.) The court would consider, that the note was duly protested, and notice given, until the contrary was shewn. It was competent for the plaintiff below, to sue in his individual character—(1 Chitty's Pl. 205, 206; 2 Williams on Executors, 1149.)

ORMOND, J.—As the declaration contained an averment, that the note was protested for non-payment, it is insisted that it was necessary to prove it. Protest not being necessary to maintain an action on a promissory note or inland bill of exchange, the averment of protest being of a fact entirely immaterial, it was not necessary to be proved. The case referred to in 1st Selwyn's Nisi Prius, note 16, has no application here, as the decision turned on an act of parliament.

It is also insisted, that the court erred in rendering judgment, the issue in law being undisposed of. The matter pleaded in the second plea, if it could have been given in evidence at all, was admissible under the general issue. As no judgment of the court seems to have been had on the demurrer to that plea, we must presume that the plea was waived. The defendant below offered to introduce Thomas Evans, the first endorser on the note

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sued on, to prove the fact stated in the second plea, which evidence, the court rejected, on the ground that the witness was interested. It is very clear, that the witness had no interest in the suit, but it is as certain that the evidence was wholly immaterial. If the defendant in error held the note, as the representative of A. G. Gordon, he had the legal title, and if it had been made directly to him in his representative character, he could have sued in his own name, disregarding the description of his title. It follows, of course, that he could sue as endorsee, when there was no such description. The evidence, therefore, should have been excluded, as wholly irrelevant. The judgment of the court was right, and will not be reversed, because it was rendered for a wrong reason.

It was also insisted, that as the note was payable at a particular place, no recovery could be had without proving a demand at the place of payment. We are clearly of opinion that no such demand was necessary to maintain the action; but that it was matter of defence for the defendant, if he was ready to pay at the time and place appointed.

In the case of *Irvin vs. Withers*, (1 Stewart, 234,) a majority of the court held, that a failure to aver and prove a demand in such a case, was cured by verdict; the minority holding that no demand was necessary. In the latter opinion, we concur.

The name of the defendant in error appearing on the back of the note, did not impair his right to recover. It was doubtless endorsed in blank, for the purpose of collection in bank, and the note not being paid, the en-

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dorsement being merely formal, the title to the note still remains in him, and the endorsement of his name on the back, must be considered a mere nullity. The failure to erase an endorsement which can have no legal effect, certainly cannot be considered a valid objection, and was so decided by this court in the case of Pitts vs. Keyser, 1 Stew. 154. Let the judgment be affirmed.

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1. If a defendant in execution have property in the county, it is the sheriff's duty to levy upon it, unless it be exempted from seizure by law.
2. The lien of an execution does not depend upon contract, but is given by law, and imparts to the elder the right of satisfaction, in preference to one that has subsequently gone into the sheriff's hands.
3. Yet this preference of an older over a younger execution creditor, does not excuse the sheriff from a levy of the latter execution, where the property is not needed to satisfy the former.
4. A return of *nulla bona* cannot be justified by the proof of a prior lien, unless the executions creating it were actually levied.

Error to the County court of Montgomery county.

This was a motion against Bell, as sheriff, suggesting, that he could have made the money on an execution, issued from Montgomery County court, in favor of the

defendant in error, against Garrett, Couch and Hooks. On the second day of June, eighteen hundred and thirty-five, the *fi. fa.* was received by Bell, as sheriff. The execution was returned *nulla bona*. The only property shewn to have been in the possession of either of the defendants, was four horses and a sulky, worth the amount of the execution, which belonged to Garrett.

It was admitted that a title to a piece of land, was in Garrett, worth from one thousand to fifteen hundred dollars; but Garrett was not in possession, nor was it shewn that Bell had any knowledge or notice of Garrett's title to said land. It was proved that King's attorney ordered Bell to levy on the horses and sulky of Garrett.

Bell then proved that two executions against Garrett, one for fourteen hundred and forty-two dollars, in favor of one Freeman, and one for two hundred dollars, in favor of Martin, were issued, and came into his hands as sheriff, before the execution of King, and both these executions were returned, "no property." There was no evidence that Bell had levied or sold the personal property under either execution. Upon this evidence, the court charged, that the fact of the sheriff's having older executions in his hands against Garrett, was no excuse, unless he had sold the property under such older executions,—to which exception was taken.

The error assigned, was the charge of the court below.

Dargan, for plaintiffs in error.

Geo. Goldthwaite, contra.

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Dargan, for plaintiffs in error, contended that the oldest *fi. fa.* binds the property—(1 Conn. R. 590)—and if the sheriff sells under the junior execution, he is liable to the plaintiffs in the elder. After a levy, if the sheriff discover older executions sufficient to exhaust the property, he may return the younger *nulla bona*.—(Champeon's *ads* White, 1 Wend. 92.)

COLLIER, C. J.—The only question brought to the view of the court in this case, is this:

Can a sheriff who has returned a *fieri facias*, *nulla bona*, when a motion is made against him, founded upon a suggestion (under the statute) that with due diligence, the amount thereof might have been collected of the defendants in execution, successfully resist the motion, by showing that he had older *fieri facias*' in his hands, of an amount equal to the entire value of the defendants property, unless he also show that these executions, entitled to a prior lien, were levied on that property?

The mandate of the *fi. fa.* directs the sheriff, that of the goods and chattels, lands and tenements of the defendant, he make the amount thereof, &c. If the defendant have property within the county, it is the sheriff's duty to levy upon it; unless it be exempted from seizure by the law—(Frost vs. Dougal, 1 Day's Rep. 128.) The lien of an execution does not depend upon contract, but is given by the law, and imparts to the elder the right of satisfaction, in preference to one that has subsequently gone into the sheriff's hands. Yet this preference of an older over a younger execution creditor, does not excuse the sheriff from a levy of the latter, where the property

is not needed to satisfy the former, as where the creditor waives his priority or gives day, which, in the case before us, might possibly be inferred. But without resorting to any such inference, we think it clear, that a return of *nulla bona*, cannot be justified by the proof of a prior lien, unless the executions creating it were actually levied. In the case of Champenor's *ads* White, (1 Wend. R. 92,) the proceeds of the property were actually appropriated to the payment of the oldest *fi. fa.*—a circumstance which very materially distinguishes that case from the present.

The defence set up, if allowable at all, must be upon the supposition that the sheriff may be proceeded against by the older execution creditors for a neglect to make the money upon the *fi. fa's* in their favor; and thus be charged to an extent greatly beyond the value of the property which was subject to levy. It cannot be endured, that a sheriff shall be allowed to excuse himself from one neglect of duty, by interposing another. In principle, this would be to off-set one wrong, by showing that the party had committed another. Besides, it does not appear that the plaintiff, Bell, did not dispose of the older executions, as he was instructed to do; and even if he did not perform his duty in regard to them, it is by no means certain that the plaintiffs in those executions will ever require him to make good to them the consequence of his neglect. So that if the defence interposed by the plaintiffs in error was permitted to avail, it would so happen that the defendant in error might lose his debt, though the defendant in execution had ample property liable to levy and sale. The judgment of the County court must be affirmed.

McCutchen, adm'rx, vs. McCutchen.

M'CUTCHEN, adm'rx, vs. M'CUTCHEN.

1. Objections raised to the time of filing a plea in abatement, founded on the rules of court, must be made in the court below, and cannot be entertained in the Supreme court.
2. The right of an administrator to the possession of the personal property of his intestate, is not impaired by an injunction forbidding its distribution.
3. Judgment for defendant on a plea in abatement, whether it be an issue in fact or in law, is, that the writ or bill be quashed, —and a *respondeas ouster* therefore is not awarded.

Error to the Circuit court of Jackson county.

Detinue for a slave.

The plaintiff brought an action of detinue in the court below, against the defendant, to recover a slave.

The defendant pleaded in abatement of the suit, that previous to the institution of the suit, she had filed her bill in chancery, claiming said slave as her own property, by virtue of a deed of gift from her husband, the plaintiff's intestate, and praying that the plaintiff be restrained from distributing said slave as part of the estate of said intestate, and that an injunction restraining such distribution was in full force. To this plea, the plaintiff demurred. The demurrer was overruled, and final judgment rendered in favor of the defendant.

The plaintiff assigned for error—

1. That the court erred in receiving the plea, as it did not appear that it was filed in proper time;
2. In overruling the demurrer;

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3. In rendering a final judgment without granting the plaintiff leave to reply to the plea.

Robinson, for plaintiff in error.

Parsons, contra.

Robinson, for plaintiff in error, cited 2 Porter, 260, to shew that the plea of defendant below ought not to have been sustained, not being filed in proper time. The court was wrong in overruling plaintiff's demurrer to the plea, as it was entitled of no term of the court—(1 Chitty's Pl. 448; 1 Tidd. 588)—and because a former suit of defendant against plaintiff, could not be plead in abatement of the action—(1 Chitty's Pl. 443; 1 Saund. on Pl. and Ev. 17, 18.) Judgment final ought not to have been rendered without leave to reply—(Aik. Dig. 277.)

ORMOND, J.—The first assignment of error rests for support on the twelfth Rule of Practice, which is, that "No plea in abatement shall be received, if objected to, unless by the endorsement of the clerk, it appear to have been filed within the time allowed for pleading." It does not appear from the record, that any objection was made by the plaintiff to the filing of this plea: we can not therefore presume that such was the fact. To permit the objection to be made here, when it was not made in the court below, would be productive frequently of great injustice, as the pleadings, if entitled at all, are generally entitled of the proper term. The record would not itself disclose the true time of filing the plea, and if it

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did, it might be that the delay was caused by the plaintiff himself. In this case, it appears that an office judgment for failing to plead, was set aside, and leave given the plaintiffs to file their declaration, and to the defendant to file her plea. In every view that we can take, there is great propriety in requiring the objection to the filing of the plea, to be made in the court below. The demurrer merely questions the legal sufficiency of the plea—not the time of filing it. This was so determined by this court, in the case of Callison *vs.* Lemons, (2 Porter's R. 145.)

But the plea itself is clearly bad. The right of the plaintiffs to the possession of the personal property of their intestate, is not impaired by an injunction, forbidding its distribution. It is both their right and their duty, to take the necessary steps to have the property of their intestate in a condition for distribution, when the proper time arrives; or to answer any other exigency which the law might cast on them, as the representatives of the deceased.

In the case of McGowen and wife *vs.* Young, (2 Stew't, 276,) an action of trover had been commenced for the conversion of four slaves. On the trial, the defendant offered in evidence the record and proceedings in a chancery suit, by which it appeared, that the plaintiff had been enjoined from removing the property in question, out of the State. But the court held that this did not bar the action, although the residuary interest was in the defendant. So, in this case, the injunction forbidding distribution of the slave in question, did not at all interfere with the right of the plaintiffs to the posses-

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sion of the slave, as the representatives of their intestate. What would have been the result, if the injunction had been, that no suit should be instituted by the plaintiffs at law, to recover the possession of the slave, it is not necessary now to determine. It is sufficient that the present bears no analogy to such a case. The court below, therefore, erred in not sustaining the plaintiffs demurrer to the defendant's plea.

The third assignment of error is not well taken. The judgment for the defendant on a plea in abatement, whether it be an issue in fact or in law, is, that the writ or bill be quashed: there was therefore no error in not awarding a *respondeas ouster*. But for the error pointed out, the judgment must be reversed, and the cause remanded.

Stephenson vs. Primrose.

STEPHENSON vs. PRIMROSE.

1. By the law merchant, the endorser of a promissory note stipulates with the endorsee, and each subsequent holder, in the ordinary course of business, that if demand of payment is made by the maker at its maturity, and due notice of the non-payment given to him,—he, *himself*, will pay the note.
2. No precise form of notice is required,—it may be verbal or in writing :
3. And where the parties all reside in the same city, it is necessary in order to fix the endorser's liability, that he be personally informed of the dishonor of the note, either verbally or in writing : or a notice should be left at his dwelling house or place of business.
4. Therefore, where the holder, within proper time after the dishonor of the note, leaves a verbal or written notice, at the endorser's counting room or place of doing business, but it is not shewn to have been left during *the hours of business*, all the parties residing in the same city,—such notice would not be sufficient.
5. But if the party entitled to notice, absent himself from his place of business *during the hours of business*, without leaving any one to attend to his interest,—the holder will be excused from giving notice *there*.
6. But if the endorser has used the precaution to obtain an assignment of all the effects of the drawer or maker, to be applied to the payment of the paper endorsed, he cannot claim an exemption from liability, because he has not had regular notice of the dishonor of the bill or note.
7. So, if he has protected himself by taking collateral security, *sufficient*, to cover the endorsement, he impliedly waives his legal right to notice.
8. Though, to this rule, there might be an exception.

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9. A room to which a man is accustomed to resort, but in which it is not shewn, that he carries on any regular trade or employment, cannot be considered his *place of business*.
10. And if the holder of paper call at a room thus resorted to, for the purpose of giving notice to its occupant of the dishonor of a note endorsed by him, at a time when he is absent :—the holder is not excused from giving notice: especially where the endorser has a dwelling house and livery stables within the same city, the latter of which, he personally superintends.

Error to the County court of Mobile.

Assumpsit on a promissory note.

This action was brought by the holder against an endorser, who pleaded the general issue, and a verdict was rendered, and judgment entered up against the defendant.

On the trial of the case, the plaintiff proved the note, endorsement and protest. B. Stanton, one of the firm of Labuzan & Stanton, who were the last endorsers on the note, was then produced, on the part of the plaintiff, who proved that he anticipated the non-payment of the note, some days before its maturity, and in order to be able to fix the liability of defendant, he enquired where Stephenson's place of business was, and was informed that it was in an upper room in a house in the city of Mobile. On the day the note was protested, he called twice at the room designated, and enquired for defendant, with a view of giving him notice—he found no one but a servant, who giving an equivocal answer, he put the note in the post office. He also left a notice at the room in question.

Another witness proved, that the room in question was the defendant's place of business, but that defendant

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had a dwelling house in the city, where he then resided, and also kept a livery stable, which he superintended himself.

Plaintiff then read in evidence, a deed made by one White, the maker of the note, conveying the property for which the note was given, to defendant, as an indemnity against the note.—The property, however, only sold for one thousand dollars.

The court charged the jury, that the law made it necessary, in order to bind an endorser, that he should have notice, and if residing in the city, a verbal notice, or notice in writing, left at his residence, counting room, or place of business, on the same day, or day after the protest. If they were satisfied from the evidence, that defendant in this case had such notice, they would find for the plaintiff; or if defendant had secured himself by taking a deed of trust on the property or effects of the maker of the note, they might find for plaintiff, although defendant had no notice of protest, &c. But if the indemnity was insufficient, proof of demand and notice was indispensable. Exceptions were taken by defendant to the charge.

Plaintiff in error assigned—

1. That evidence was admitted which was inadmissible;
2. That the charge of the court was incorrect in point of law.

Campbell, for plaintiff in error.

COLLIER, C. J.—The points made at the argument arise out of the bill of exceptions, and present these questions:

First.—Is the omission to give notice to an endorser, of the non-payment of a promissory note, excused by proof, that the holder, within the proper time after its dishonor, *left a written or verbal notice* at the endorser's counting-room, or place of doing business, where all the parties reside in the same city?

Second.—If an endorser has secured himself by a mortgage or lien on the property of the maker, does he thereby waive his right to notice of a demand and refusal?

Third.—Can a room to which a man is accustomed to resort, but in which it is not shown, that he carries on *any regular trade or employment*, be considered his *place of business*—and if the holder of paper call at a room thus resorted to, for the purpose of giving notice to its occupant of the dishonor of a note, endorsed by him, at a time when he is absent, is the holder excused from giving notice; especially where it appears that the endorser has a dwelling house and livery stables within the same city, the latter of which he personally superintends?

First.—Every endorsement of a promissory note, constitutes in itself a new and substantive contract. According to the law merchant, the endorser stipulates with the endorsee, and each subsequent holder, (in the ordinary course of business,) that if a demand of payment is made of the maker at its maturity, and due notice of the non-payment is given him, then, he *himself* will pay the note. The undertaking of the endorser is conditional: contemplating some act to be done on the part of the holder; and before his liability becomes absolute, it must be shewn, either that a performance of the condition

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was prevented by some act of the party entitled to claim its benefit, or that he has waived the necessity of performing it.

No precise form is required in giving notice to an endorser. Its object is to inform him of the failure of the maker to meet his engagement with promptness, and to advise him that he will be looked to, for payment, in order that he may take measures for his indemnity; and any means of communicating this information, whether verbally or in writing, will be sufficient—(Shed *vs.* Brett, 1 Pick. Rep. 401; Mills *vs.* the Bank of the United States, 11 Wheat. Rep. 431; Reedy *vs.* Seixas, 2 Johns. Cases, 337; Smith *vs.* Whiting, 12 Mass. R. 6; Cowles *vs.* Harts, 3 Conn. Rep. 516; Solarte *vs.* Palmer, 7 Bingh. Rep. 629.)

In the case before us, the note was made payable at the Bank of Mobile. The parties both resided in that city, so that according to a well established rule, it was necessary in order to fix the endorser's liability, that he should have been personally informed of the dishonor of the note, either verbally or in writing; or a notice should have been left at his dwelling house, or place of business. Either mode would have been sufficient, but one or the other was essential, unless the plaintiff, by his own act, prevented it—(Williams *vs.* the Bank of the United States, 2 Pet. Rep. 96; Ireland *vs.* Kip, 10 Johns. Rep. 490; 11 *ibid.* 231; Bank of Columbia *vs.* Lawrence, 1 Pet. Rep. 578; Smedes *vs.* the Utica Bank, 20 Johns. Rep. 372; 3 Kent's Com. and cases there cited.) It is not pretended that a personal notice was given to the plaintiff, but only that a room in the city (understood

by the holder to be his place of business,) was twice visited for the purpose of giving him notice of the dishonor of the note—that he was not in the room at either of these visits, nor was any one else, but a servant, who, to the witness' enquiries, returned an equivocal answer. The holder made no farther effort to find the plaintiff, but deposited a written notice in the post office, for him. Conceding that the place at which the plaintiff was sought, was his place of business, and still we think the effort to give notice was insufficient. It is indispensable to the holder's right of recovery, to prove that the endorser has been duly advised of the default of the maker; or to shew a sufficient excuse for the failure to give him notice. Now, to make the excuse available, it should have been shown, not only that the witness called at the plaintiff's place of business, but it should appear further, that the visit was made at a seasonable time—viz. *within the hours of business*. Then, it may be supposed that he should be there in person, or if absent, that his clerks, or others, were there, to receive and communicate a notice to him; but when the hour for relaxation, or rather the period for the suspension of business shall have arrived, the man of business should be sought rather at his dwelling house, than elsewhere.

In *Shed vs. Brett and Trustees*, (1 Pick. Rep. 413,) a notary public testified, that when the note became due, he went with it, at the request of the endorsee, to the place of business of the promisors, and found it closed, no person being there, of whom he could make a demand. It was objected, that the testimony did not prove a demand, nor a sufficient excuse for it. The court consid-

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ered, that what was done was sufficient, if the witness could state that he went to the place of business of the makers, in business hours, but unless he could state this fact, the demand was not excused, and the endorser was not liable.

In *Crosse vs. Smith and others*, (1 M. & S. 545,) an effort was made to give notice to the drawers, of the non-payment of a bill of exchange, by sending it to their counting-house during hours of business, on two successive days, knocking there, and making sufficient noise to be heard by persons within, and waiting there several minutes—the inner-door being locked. This was considered sufficient, without leaving a written notice, or sending it by the post.

And in *Goldsmith and others vs. Bland and others*, (Bailey on Bills, 127, or late ed. 224, note 1,) with the view of charging the defendants as the endorsers of two foreign bills, and to prove notice, it was shown by the plaintiffs, that they sent a clerk to the defendant's counting-house, between four and five o'clock in the evening—nobody was in—the clerk saw a servant girl, who said no one was there, and he returned, having left no message with her. Lord Eldon, who presided on the circuit, told the jury, that if they thought the defendant ought to have had somebody in the counting-house at the time, he was of opinion that the plaintiffs had done all that was necessary, by sending their clerk—that the notice was in law sufficient, if the time was regular, &c. The learned Lord doubtless intended to refer to them the question of fact, whether the call was made at the defendant's counting-house, within business hours, and no

thing more; for this fact being found affirmatively, the law determined the sufficiency of the excuse to give notice.

Goldsmith and others *vs.* Bland others, says Mr. Justice Washington, (2 Peters' Rep. 101,) decides "that it was sufficient to send a verbal notice to the defendant's counting-house, and if no person be there in the ordinary hours of business to receive it, it is not necessary to leave or send a written one. "The principle of this decision is," says that learned judge, "that the counting-house of the defendant, is the place in which the holder was entitled, during the regular hours of business, to look for the person for whom the notice was intended, or for some one authorised by him to receive it"—(See further, *Bowes vs. Howe*, 5 Taunt. R. 30; 4 T. R. 456; 1 B. & Pul. 394.)

This, we think, authority ample to show that a drawer or endorser of a bill or note, may be sought within the regular time after the dishonor of either, at their places of business, for the purpose of giving them a notice, and if absent during *the hours of business*, without leaving any one to attend to their interest, the holder will be excused from giving notice. In the case before us, it does not appear that either of the visits to the room in which the plaintiffs carried on business, was made within business hours, and as the excuse for omitting to give notice was incomplete, without proof of that additional fact, the judge of the County court, in not thus qualifying his instructions to the jury on this point, mistook the law.

Second.—If an endorser has used the precaution to ob-

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tain an assignment of all the effects of the drawer or maker, to be applied to the payment of the paper endorsed, he cannot claim an exemption from liability, because he has not had regular notice of the dishonor of the bill or note. The reason why he is entitled to notice is, that he may take the necessary measures to obtain payment from the parties liable to him, and if notice be not given, it is a presumption of law, that he is prejudiced by the omission; but if the endorser has already obtained a transfer of the entire estate of the drawer or maker, he would have nothing to gain by a notice, and consequently, could not be injured by the want of it. So, if the endorser has protected himself from loss, by taking collateral security *sufficient* to cover his endorsement, he has impliedly waived his legal right to require proof of demand and notice. We do not undertake to determine, that this latter proposition is universally true: be this as it may, it will be time enough to enquire whether it has its exceptions, when a proper case shall arise.

As the effect of an assignment of property, or a collateral security, upon the general rights of an endorser, is for the first time brought before this court, it may not be out of place to enquire how the question stands upon authority. Corney vs. Da Costa, (1 Esp. R. 302,) is the earliest case that has fallen under our notice. In that case, it appears that the defendant was sued as the endorser of a promissory note. To secure him against the makers default, he had taken of their effects, an amount equal in value to the note. Mr. Justice Buller said it was undoubtedly true, that an endorser should have notice of

the dishonor of a note, but that was not the case, where he could not suffer from the want of it. The maker had waived his right to insist upon a notice, and was liable at all events. In *Brown vs. Maffey*, (15 East's R. 222,) Mr. Justice Bayley cites *Corney vs. Da Costa*, and says it was decided upon the ground, that it "would have been a fraud in the endorser, to call upon the maker, because, before it became due, the maker had deposited effects in his hands, to answer the amount of his endorsement, and therefore, he had no right to complain of the want of notice."

Bond and others vs. Farnham, (5 Mass. R. 170,) was a case in which the plaintiff, to obviate the necessity of notice to the endorser, proved, that before the note was payable, the maker had assigned *all* his property to the defendant, for his security against his endorsement. The court considered, that notice was not essential to the plaintiff's right of recovery, and say, "The case most analagous to this, is, where a drawer of a bill had no effects in the drawee's hands. He cannot insist upon a demand upon the drawee, for he could not expect an acceptance, and he suffers no injury by the want of it. The endorser of a note resembles the drawer of a bill. Although once having effects, as he had a demand on the maker, yet he has afterwards withdrawn from the maker all his property, to enable himself to meet his own endorsement, and had not, when the bill was payable, any remedy, unless, perhaps, the miserable one of seizing the body of a man worth nothing." In *Barton vs. Baker*, (1 Serg. & Rawle's R. 334,) the court cite, with approbation, *Bond and others vs. Farnham*, and thought

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it not unreasonable to presume, that an endorser, situated as was the defendant in that case, took upon himself to provide for the paper endorsed by him. This question was also considered in the Mechanics' Bank of New York vs. Griswold, (7 Wend. Rep. 165,) and the conclusion attained, that where an endorser is *amply* indemnified by the maker, or where he has taken an assignment of *all* his effects to meet his responsibility, he cannot resist a recovery by insisting on the want of notice.

Prentiss vs. Danielson, (5 Conn. Rep. 176,) was a case in which the maker of a note had conveyed certain property to the endorser, to indemnify himself against his liabilities and endorsements on account of the maker;—the property conveyed was an insufficient security. The court held, that if an endorser receives security to meet a particular endorsement, he waives a demand and notice in respect to that endorsement, but not as to any other. But inasmuch as the defendant was implicated for the maker to the full amount of the property conveyed, aside from the note in question, and as his liability growing out of the endorsement of the note was extinguished, before the security was given, the conveyance of the property for his indemnity, did not have the effect of reviving it. And in Tower vs. Durell, (9 Mass. R. 332,) the principle decided in Bond and others vs. Farnham, is recognised; but the court determine, that where an endorser of a promissory note, believes a demand to have been duly made on the maker, and that notice has been duly given to himself, and believing himself therefore liable, takes measures for his indemnity, this will not excuse the holder from proving a regular demand and notice.

The last case we shall notice, is *Mead vs. Small*, (2 Greenl. R. 207.) In that case, the endorser had taken a mortgage on real estate, which was a *sufficient* security for the amount of the note endorsed—The court decided that “if the endorser has protected himself from eventual loss by his own act, in taking security from the maker, such conduct must be considered as a waiver of the legal right to require proof of demand and notice. And we are of opinion accordingly, that the facts before us clearly shew such a waiver in the present case.”

The court also said, that the facts presented a stronger case for the plaintiff, than *Bond and others vs. Farnham*. There, the property pledged was not a *sufficient* indemnity, but it was *all* the maker had—while in the case before them, the security was ample—(See also *Chitty on Bills*, 203; 3 *Kent's Com.* 79.)

The inferences deducible from the cases cited, are—

1. Where an endorser, before the maturity of the note, obtains an assignment of *all* the maker's property to meet his responsibility, he impliedly waives his right to insist on a demand of payment, and notice of non-payment.

2. Where the endorser receives of the maker a collateral security, whether by mortgage or otherwise, to indemnify him against the consequences of his endorsement, if the security be *sufficient*, the maker's default will fix the endorser's liability, without the previous steps of a demand and notice. The judge of the County court stated the law to the jury as we have laid it down in our second inference, so that the verdict could not have been influenced by any consideration growing out of

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the deed of trust ; for it clearly appears, that the property covered by the deed was far from being an adequate indemnity.

3. The term "business," in common parlance, means that *employment which occupies the time, attention and labor*. That which a man occasionally engages in, as opportunity offers, or inclination prompts, is, for the time being, his business; yet, so far as the question we are examining is concerned, the law uses that term, to indicate a regular and legal employment—not one that is *occasional, irregular or illegal*. And a *place of business* must be understood to be a place actually occupied, either continually or at regular periods, by a person or his clerks, or those in his employment. If business is transacted there sometimes, but at no stated periods, the occupant, his clerks, &c., cannot be supposed to be there at any other time to receive notice of the dishonor of paper. To make a room a place of business, in contemplation of law, the employment must be of a nature not criminal. Thus, a place at which a *band of freebooters* are accustomed regularly to assemble to divide their *unholy thrift*, or at which the *gambler* statedly exhibits his *arts*, to allure the idle and incautious, cannot be regarded as their places of business: for their employments being denounced as criminal, the law will not presume that they should be at the places, at which they are carried on, when they are absent; and consequently, does not consider an ineffectual effort to give them notice there, equivalent to personal notice.

It was shown at the trial, that the only business pursued by the plaintiff, was that of keeping a livery stable

at another part of the city, than that, at which, the room he was sought, was situated—that he superintended it in person, and was frequently there. It also appeared, that the plaintiff had a dwelling house in the city, where he resided, and though he might often be found at the *room*, there was no proof that he carried on any particular business there. These facts clearly show that the *room* was not used by the plaintiff for any *regular business*, but his *place of business* was his livery stable; and either there or at his dwelling house, should he have been sought. We deem it unnecessary to determine, whether the instruction moved upon this point should have been given, considering the terms in which it was asked: as the judgment must be reversed upon the first ground, the plaintiff, should it become necessary upon a second trial, can modify his motion for instructions, in conformity with the law, as we have ascertained it.

Judgment reversed, and cause remanded.

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Houck vs. Scott.

HOUCK vs. SCOTT.

1. After judgment of *respondeas ouster*, upon a demurrer to a plea in abatement,—no other plea in abatement can be allowed.

Error to the Circuit court of Morgan county.

Appeal from the judgment of a justice of the peace, tried before Judge Lane.

This action was originally commenced by the plaintiff against the defendant, before a justice of the peace, where he obtained a judgment against the defendant. From this judgment, an appeal was taken to the Circuit court of Morgan county. The defendant pleaded in abatement of the suit, that he was a resident freeholder of Limestone county. To this plea, the plaintiff demurred. The court sustained the demurrer, and gave the defendant leave to plead over. The defendant then filed a second plea in abatement, embracing the same subject matter as the first. This plea, the plaintiff moved the court to strike out; which motion, the court refused, and to which refusal, the plaintiff excepted. The plaintiff then demurred to the second plea, which the court overruled, and rendered judgment for the defendant. These matters were assigned for error.

Parsons, for plaintiff in error.

McClung, contra.

ORMOND, J.—The judgment of the court of *respondeas ouster*, after sustaining the demurrer of the plaintiff to

the first plea filed in abatement was correct; but it was error to permit the defendant to file another plea in abatement. After judgment of *respondeat ouster*, no other plea in abatement can be allowed—(Cresswell vs. Vaughan, 2 Saunders' R. 40, 41.) This being the law, the court should have rejected the second plea filed in abatement, which the motion of the plaintiff to strike out was equivalent to, and which should have been granted.

It follows, by necessary consequence, that as the plea was not authorised, and should have been rejected by the court, that the plaintiff's demurrer to it should have been sustained.

The judgment is reversed, and the cause remanded.

ADM'RS OF WEATHERFORD *vs.* WEATHERFORD.

1. Where judgment is rendered *de bonis propriis*, when it should be *de bonis intestatis*,—the Supreme court will only reverse, and render.
2. A judgment rendered at a term of a court unauthorised by law, is erroneous.
3. Statutes appointing the times, for courts to be holden, are public acts, and will be judicially taken notice of.
4. A statute, where no time is fixed for the commencement of its operation, takes effect from its passage.
5. Where the Legislature passed a statute on the twenty-second December, eighteen hundred and thirty-six, requiring the courts of a particular circuit to be holden at a particular time; and on the twenty-third December, eighteen hundred and thirty-six, enacted a statute upon the same subject,—providing that the act should not take effect until the first day of August after its passage :—It was held—
 1. That the passing of the last statute did not repeal that of twenty-second December.
 2. That though one of the courts of the circuit was not provided for in the act of the twenty-second December, yet the omission could not influence, as the court so omitted should be holden at the time appointed by the pre-existing law, though it should conflict with some other court in the circuit :—in which event, the judge appointed to the circuit, should call to his aid another judge.

This was an action of assumpsit for money lent, laid out and expended, &c. to and for the use of the intestate of the plaintiffs in error. There was a verdict and judgment for defendant in error, on the plea of non-assumpsit.

Adm'rs of Weatherford *vs.* Weatherford.

The writ was dated twenty-ninth February, eighteen hundred and thirty-six, and the entry of judgment was—"At a Circuit court began and held for the county of Conecuh, on the first Monday of March, A. D. 1836."

It was here assigned in error—

1. That the judgment was *de bonis propriis*;
2. That the court was held at a time not authorised by law.

Parsons, for plaintiffs in error.

Porter, contra.

COLLIER, C. J.—Two points have been made by the plaintiffs in error.

1. The judgment is rendered *de bonis propriis*, when it should have been *de bonis intestatis*.

2. The judgment was rendered at a time when the law did not authorise the court to be holden.

First.—The cause of action, as shown by the declaration, being a liability incurred by the intestate of the plaintiffs, there can be no doubt, but the judgment should have been rendered *de bonis intestatis*. But as the judgment of the Circuit court would either be reversed and rendered, or corrected as for a clerical mistake under the statute, and the case could not be remanded,—we proceed to consider the second point.

Second.—Previous to the twenty-second December, eighteen hundred and thirty-six, the Spring term of the Circuit court for the county of Conecuh, was required to be holden on the first Monday in March. On that day, a law was enacted, entitled "An act to change the time of

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the courts of the eighth judicial circuit of the State of Alabama;" the fifth section of which is as follows: "That hereafter, the Circuit courts of the first judicial circuit, shall be commenced and holden as follows: In the county of Conecuh, on the third Monday in March; in the county of Monroe, on the fourth Monday of March; in the county of Washington, on the second Monday after the fourth Monday in March; in the county of Baldwin, on the third Monday after the fourth Monday in March; and in Mobile, on the fourth Monday after the fourth Monday in March, and continue in session until the business is ended"—(Acts of 1836, pp. 8.) On the twenty-third December, eighteen hundred and thirty-six, a law was passed, entitled "An act, the better to organise the Circuit courts of Mobile county, and to regulate the proceedings therein, and for other purposes;" the second section of which is in these words: "That from and after the passage of this act, the Spring term of the first judicial circuit shall be holden at the times following, to wit: In the county of Conecuh, on the third Monday in March, in each and every year, and continue one week; in Monroe, on the fourth Monday in March, and continue one week; in Clarke, on the first Monday in April, and continue one week; in the county of Washington, on the second Monday in April, and continue one week; in the county of Baldwin, on the third Monday in April, and continue one week; and in the county of Mobile, on the fourth Monday in April, and continue until the whole of the business is disposed of." This statute then provides for the fall terms of the circuit, and contains several regulations in regard to juries in Mobile county, and

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concludes with the following *proviso*: "*Provided, This act shall not take effect until the first day of August next.*"

The first statute, it will be observed, is silent, in regard to the Spring term of the Circuit court of Clarke, yet this omission can have no influence upon the act, so far as it may be operative. That court should have been holden at the time appointed by the pre-existing law, even though it should conflict with some other court in the circuit, so as to make it impossible for the same judge to hold both. A difficulty of the kind once occurred in the organization of the courts of the second circuit. By an act of the sixteenth January, eighteen hundred and thirty-four, the courts of Wilcox and Bibb were directed to be holden on the same day, and both were actually holden—the judge appointed to the circuit, calling to his aid another judge, to hold the Spring and fall terms in Bibb county, for the year eighteen hundred and thirty-four.

A statute, according to the settled rule in the courts of the United States, and of the States of the Union, where no time is fixed for the commencement of its operation, takes effect from its passage—(1 Kent's Com. 426, and cases there cited.) Taking this as the true rule, the act of the twenty-second December was in full force, when that of the twenty-third December was enacted; and the question now is, did the latter statute either expressly or impliedly repeal the former. It is clear, that it is not an express repeal, for the act of the twenty-third of December nowhere notices that of the twenty-second. Nor can we conceive how it can operate an implied repeal—

they do not come in conflict—the statute of the twenty-third is suspended in its operation by the *proviso* we have quoted, until the first day of August next after its passage, and could not until that day, annul, by its repugnance, a pre-existing law. The question, then, of a repeal by implication, could not arise until the last act became operative, and then not sooner than the time appointed for the Spring circuit in eighteen hundred and thirty-eight, before which, the legislature, by a subsequent enactment, removed all difficulty.

Dwarris, in his *treatise on statutes*, says that “An act cannot be altered or repealed in the same session in which it is passed, unless there be a clause inserted, expressly reserving a power to do so”—(pp. 673.) The author refers to no adjudicated case, and the view we have taken of the present case, relieves us from enquiring whether the fact of both acts having been passed at the same session of the legislature, makes a difference favorable to the plaintiffs, as it is clear it does not prejudice them.

The *judgment* complained of, having been rendered at the term of a court, holden at a time unauthorised by law, though the proceedings have all the forms necessary to give to *it* validity, *it* is nevertheless erroneous. The statutes appointing the times for the courts to be holden, are public acts, and must be noticed by this court.

The judgment of the Circuit court must therefore be reversed, and the cause remanded.

INNERARRITY *vs.* BYRNE.

1. Evidence which has *prima facie* no pertinence to the issue, is rightfully rejected.
2. Where a party claims the benefit of an exception to this rule, he must bring himself within it by pleading or proof.
3. Grants made by the Spanish authorities in this country, after the date of the treaty of St. Ildefonso, (1 October, 1800,) except those to actual settlers acquired before December twentieth, eighteen hundred and three,—are null and void.

Error to the Circuit court of Baldwin county.

Trespass, to try title, before *Paul, J.*

In this case, plaintiff, to support his action, offered in evidence, a grant (from the Spanish government to one Forbes, under whom plaintiff claimed,) dated February sixth, eighteen hundred and six. The evidence was rejected, on the ground that the grant was made by a government which had no power or authority to make such a grant. Defendant had a verdict, and the exclusion of the grant as evidence was assigned as erroneous.

Thornton, for plaintiff in error.

Campbell & Porter, contra.

ORMOND, J.—This was an action of trespass, to try title.

The plaintiff below, who is the plaintiff in this court, relied on a grant from the Spanish government, to John Forbes & Co., for the premises mentioned in the declara-

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tion, and proposed, by testimony, to deraign title from Forbes & Co., to himself. The court rejected the grant, on the ground that the Spanish government had no authority to make such grant. The case is brought here for revision.

The grant bears date the seventh of March, one thousand eight hundred and seven. It has been solemnly determined by the Supreme court of the United States, in the case of Foster & Elam vs. Neillson, (2 Peters' Rep. 309,) and again in the case of Manuel Garcia vs. Samuel Lee, that all grants made by the Spanish authorities, after the date of the treaty of St. Ildefonso, (1st October, 1800,) excepting only those to actual settlers, acquired before December twentieth, eighteen hundred and three, were null and void. The grant of the land in question, being at a time, when, according to the decision of the two cases referred to, the Spanish authorities had no power to make a grant—must be held null and void.

The counsel for the plaintiff in error does not attempt to maintain the proposition, that the grant of the land in question is valid *per se*, but insists that the decision of the court prevented him from introducing other testimony, by which his grant, or a portion thereof, might have been rendered valid.

It is true, that the court will not interfere with a party, by dictating to him in what order he shall produce his testimony;—yet, it is certainly as clear, if testimony is offered, which in itself is inoperative and void, and is not proposed to be connected with any thing else which may give it validity, the court, if desired, cannot refuse to reject it.

In this case, the grant, of itself, was absolutely void ; it might have constituted a link in the plaintiff's chain of title, if he had been able to show an act of Congress, securing to him the land in question, or a portion of it, as has been done in some cases of Spanish grants, which were not embraced by the act of Congress of eighteen hundred and four. But surely the court could not presume that such was the fact, and refuse to exclude a void grant, because, by some act entirely extrinsic to it, the party might be able to show a good title.

We have been referred to the case of Spears vs. Cross, (7 Porter, 437,) decided at this term, as governing this case. There, the judgment was reversed, because the court refused to permit a warrant issued by a justice of the peace, on the part of the State, to be read in evidence, in an action brought for a malicious prosecution, because no affidavit in writing was produced, although an offer was made to prove that the oath was in fact taken, though not committed to writing. The correctness of the decision of the court below, turned on the fact, whether an affidavit in writing was necessary in such cases or not. To make this case parallel with that, it should appear, that testimony which ought to have been received, was rejected.

The case of Reed vs. the Brashers, (3 Porter's R. 375,) has also been referred to; but in that case, the evidence rejected was pertinent to the issue, though not sufficient of itself to maintain the action, and therefore improperly rejected. In this case, the evidence offered being a void grant, was not good of itself, for any purpose, and therefore properly rejected.

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We cannot interpret the silence of the bill of exceptions, to mean any thing else, than that the cause was rested on the validity of the Spanish grant, found in the record.

The judgment of the court below must be affirmed.

COLLIER, C. J.—The great earnestness with which the plaintiff's counsel has pressed this case upon the court, induces me to add a remark or two, to what has been said by his honor, Judge Ormond. Neither *Spears vs. Cross*, or *Reed vs. the Brashers*, bear any analogy to the present case. In those cases, the evidence rejected was clearly legal, and tended to establish the issue, though in *itself* insufficient, and consequently, according to all rule, was admissible, as forming a necessary link in the proof, by which a right was to be established. Here, the paper rejected was not only illegal, but absolutely *void*, and in itself, proved nothing. If the plaintiff would have relieved it from this objection; he should have shown, or have offered to show, that vitality had been imparted to it in the manner prescribed by the acts of Congress relating to titles to land lying south of latitude thirty-one, in this State. Until this was done, the paper was clearly inadmissible. In *Clendenning & Bulkley vs. Ross*, (3 Stewart & Porter, 267,) this court decided, that that evidence was rightfully rejected, which *prima facie* had no pertinence to the issue, and that to have authorised its admission, the party offering it, should have shown that it was pertinent. So, in the adm'r of *Gee vs. Williamson*, (1 Porter's R. 320,) in the court below, a record was given in evidence, which was insisted

on error, to have been improperly received. This court determined, that the record was wholly inadmissible as evidence, unless it had been preceded or accompanied by explanatory evidence, showing its relevancy. And in *Wiswall vs. Ross & Earle*, (4 Porter's R. 330,) this court say: "If the competency of any matter as testimony depends upon some fact, of which there is no proof, there is no error in rejecting such matter, when presented alone, and without an offer to prove what might make it competent evidence." These cases fully maintain the principle on which we place our judgment in this case; though perhaps the reasons in the present case are stronger in favor of a rejection of the evidence, than in those cited—(See also *Jenkins vs. Noel*, 3 Stew. R. 60; the *Union Bank of Maryland vs. Ridgely*, 1 Har. & Gill's R. 324.)

Again, it is a well settled rule, that where a party claims the benefit of an exception, he must bring himself within it by pleading or proof. The acts of Congress which give validity to some grants for land south of thirty-one, which would otherwise be void by *Treaty of St. Ildefonso*, are exceptions to the general operations of that *Treaty*, and before such grants can be received as evidence of title, proof of confirmation must be adduced. The consequence is, that the judgment must be affirmed.

GOLDTHWAITE, J., did not sit—having been of counsel.

Nettles, adm'r, vs. Barnett.

NETTLES, adm'r, vs. BARNETT.

1. At common law, actions that arise from contracts, for the payment of money, or for the performance of duties where property is in question, survive to the executor or administrator—actions for injuries to the person, character or property of individuals, die with the person.
2. The statutes modifying this rule, do not extend relief against the executor or administrator, for an injury to personal property, committed by the testator or intestate.
3. The statute of eighteen hundred and twenty-six, provides that all actions of trespass *quare clausum fregit*, and actions to recover damages for injuries to personal property, may, if the *plaintiff* dies, be revived by his executor or administrator, in the same manner as actions on contracts, but does not apply to *defendants*.
4. Trover, where property has been converted, or an action for money had and received, on an implied contract, waiving the injury, may be maintained against an executor or administrator, where the property has been sold by a testator or intestate; and if the property be in specie, in the hands of the personal representative, he can be made personally amenable for it.
5. But an action of trespass proper, does not survive against the representative of the wrong doer, where commenced in his life time; and in such case, the representatives cannot make themselves parties, to the suit.

Error to the Circuit court of Wilcox.

Trespass, tried before *Harris, J.*

This was an action of trespass, brought by Barnett, as an acting constable, against the intestate. In the declaration, the plaintiff alleged, that as constable, he had levied certain executions, on one hundred and fifty bushels of corn, the property of one John B. Barefoot, the

defendant in the executions—which corn he took possession of; when the intestate, with force and arms, &c. broke and entered the barn, where the corn was housed, and took and carried the same away, and converted, &c. by means whereof the plaintiff lost, and was deprived of the profits and benefits which would have accrued to him from the sale of the corn, and which had subjected him to loss and damages.

At a succeeding term, the death of the intestate was suggested, and the plaintiff in error, the administrator, made party to the suit. Verdict for plaintiff below; on which judgment was rendered *de bonis intestatis*.

The bill of exceptions disclosed proof of a levy on the corn: that the day before the levy, plaintiff had levied on two horses, which were of more value, than the amount called for by the executions levied: that the corn had been sold while growing, and before matured, (two months before the levy,) to the intestate, and that the defendant in execution had then received pay for the corn. The corn was placed in an old house without a door, on the land where raised, which was rented land. The witness (who was the defendant in the executions,) also proved that he had rescued the horses from the plaintiff. There were about one hundred and fifty bushels of corn.

Another witness proved the purchase of the corn, and that payment was made for it before the levy, but that it was not carried away until after the intestate said he had bought one hundred bushels from defendant in the execution, and paid for it, and would have it, notwithstanding the levy.

The defendant desired the court to charge the jury,

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that a levy of property, sufficient to satisfy the execution, discharged the debt, so far as to vest a *good title* in a *purchaser* for a valuable consideration, although the property was rescued, and that the officer was liable to the plaintiff in execution.

But the court charged the jury, that the levy on the horses, must be totally disregarded, as it did not deprive the officer of the right to levy on other property, after the rescue by the defendant in execution. The court further charged, that the rule of law which requires a delivery of personal property to perfect a contract, at the time of the sale, was universal, to which defendant excepted.

And here assigned for error :

1. The charge asked and not given, and the charges as given;
2. That the court erred in rendering judgment against defendants.

Clarke, for the plaintiff in error.

Porter, contra.

Clarke, for plaintiff, contended—

That an action of trespass *de bonis asportatis*, commenced against the wrong doer, could not be revived against his representatives in the event of his death—and referred to Aik. Dig. 260; Ch. Pl. 60 and 82, marg.; Toller, 459; Hambly vs. Trot, 1 Cowp. 371; People vs. Gibbs, 8 Wend. 29; Nicholson vs. Elton, 13 S. & R. 415; Latimore, &c. vs. Simmons, ib. 183.

GOLDTHWAITE, J.—One of the assignments of error presents a question, which is, in our opinion, decisive of this case, and renders it unnecessary to express any judgment, on those arising from the bill of exceptions.

It is an ancient and uncontested maxim of the common law, that personal actions die with the person. These actions have never been understood to be those which arise from contracts, for the payment of money, or for the performance of duties where property is in question; but the maxim is confined in its government, to those actions for injuries to the person, character or property of individuals. It was early perceived in England, as personal property became more and more valuable, that it ought to be in some degree withdrawn from the rule, admitted to prevail. Accordingly, the statute of 4th Edward 3, ch. 7, was enacted, which gave an action to an executor, for an injury done to the personal property of his testator in his life time, which was subsequently extended by other statutes, to the executor of an executor, and to an administrator.

The construction which these statutes have received in the English courts, has extended the remedy of an administrator or executor to almost every species of action for injuries to the personal property of the intestate or testator. But they have never been held to extend relief against the executor or administrator, for an injury of the same character committed by his testator or intestate—(1 Saund. 216, n. 1.)

In this State, the statutes of Edward III have been adopted, and even extended, by the act of eighteen hundred and twenty-six, (Aik. Dig. 260, s. 6 which pro-

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vides that all actions of trespass *quare clausum fregit*, and actions of trespass to recover damages for injuries to personal property, may, if the *plaintiff* dies, be revived by his executor or administrator, in the same manner as actions on contracts. It will be seen, however, that none of the terms used by this act, will authorise an inference, that it was intended to apply to the case of *defendants*; and indeed it might well be questioned, whether there is not much reason why no right of survivorship should be given for such injuries *against* an individual; as the only use of the particular form of action would be to authorise the rendition of vindictive damages. As the action of trover by statute survives for and against executors and administrators, this form of action will give ample relief, where the personal estate has been converted previous to the death. Or, if it has been sold, an action for money had and received on the implied contract, waiving the injury, can be maintained. If the property remains in specie, in the hands of the personal representative, he could be made personally answerable for it.

If this form of action is permitted to survive against a personal representative, it would be governed by the same rules as an original suit, and vindictive damages might be awarded after the death of the wrong doer. This is one of the evils which was restrained by the maxim of the common law, and none of the legislation on this subject authorises the inference, that a different rule was intended to be given. The construction given to similar statutes in other States, has been the same as now given by us.

In the case of Nicholson vs. Elton, (13 S. & R. 415,) the precise question now presented arose, and was determined in conformity with the views we have expressed. So, in the case of Stebbens vs. Palmer, (1 Pickering, 71,) an action for breach of promise of marriage was held not to survive, though in form, an action *ex contractu*. (See also Hinch vs. Metzger, 6 S. & R. 272; Lattimore vs. Simmons, 13 S. & R. 183; Hambly vs. Trott, Cowp. 376.)

The defendant to the action having died pending the suit, it thereby abated, and could not be revived. It was irregular, to permit his administrators to make themselves parties, and for this error, the judgment is reversed, and a judgment here rendered, abating said suit.

Fryer vs. McRae.

FRYER VS. M'RAE.

1. A citizen does not lose the right to reclaim property taken from him in times of public emergence, when the necessity which induced its seizure has passed away.
2. And until his consent to part with it is freely given, he is to be considered its rightful owner, until time shall have divested his right of property.
3. Therefore, where a horse had been seized under pretence of necessity for the public service, and was refused to be delivered, on demand made, after the exigence which induced the seizure had passed—it was held that trover would lie for his recovery.

On writ of error to Talladega Circuit court.

Trover, tried before *Shortridge*, J.

The plaintiff declared against the defendant, in an action of trover; for that plaintiff, on the first day of September, in the year one thousand eight hundred and thirty-six, was possessed of a certain dark bay horse, of the value of two hundred dollars, which he casually lost, and which afterwards came to the possession of defendant by finding, who refused to deliver him to plaintiff, and disposed of him to his own use, &c.

To this declaration, the defendant pleaded not guilty, and also justified the taking of the horse, under an order from Major General Irwin, then commanding the State troops in service.

On this state of the pleadings, issue was joined, and a verdict rendered for the defendant.

To the proceedings below, plaintiff filed his bill of ex-

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ceptions, which stated, that on the trial of the cause, it appeared in evidence, that defendant, in May, eighteen hundred and thirty-six, was appointed by Major General Irwin, commanding the State troops then in service, to suppress the Creek insurrection, to carry necessary despatches, in relation to said service, from Irwinton, Barbour county, to the Governor, then at Montgomery, Alabama. That it was necessary to the public service, that the despatch should be conveyed, and that with the utmost celerity; and to that end, said General Irwin had caused to be given to said defendant, written authority to press fresh horses by the way, as often as his horse failed:—That on the way to Montgomery, conveying said despatch, defendant's horse failed at plaintiff's house, and the horse sued for was taken by defendant without plaintiff's consent, under the authority, and for the purpose aforesaid. At the time of taking said horse, defendant left with plaintiff a receipt for said horse, certifying that the same was taken for said service, and was appraised at one hundred and seventy-five dollars. It was further in evidence, that defendant, a short time afterwards, passed through plaintiff's neighborhood, leading the same horse, and riding another:—that defendant took plaintiff's horse with him: that some time after that, plaintiff met defendant, and asked what had become of his horse: that defendant made some evasive reply, but concluded by saying plaintiff should be paid for his horse:—It was further proved, that defendant traded said horse off, and never returned him.

The court charged the jury, in case they believed the necessity of the times justified the authority under which

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defendant acted, then the taking, though only for the object stated, vested the right of property in the government, and complainant thereafter, could have no right of action against the agent taking, or any other person, in respect of the horse sued for: and that his only remedy was by application to the government, on the certificate for the appraised value: to all which, plaintiff excepted, &c.

Plaintiff's counsel contended, that although the necessity might have justified the government agent in seizing and using the horse for a specific and needful purpose, yet as soon as the end of the taking was answered, the right of the property and right of possession reverted to plaintiff, and if it remained in specie, unconsumed by the service—defendant's refusal to deliver on demand, or his applying the property to his own use after the object of the taking was answered, rendered him liable to account to plaintiff in this form of action.

Porter, for the plaintiff in error.

GOLDTHWAITE, J.—The plaintiff not having requested any instructions to be given to the jury at the trial, as to the lawfulness of the authority under which the defendant seems to have acted, it will be unnecessary for the court to examine, whether any person can be deprived of his property by the order or direction of a military commander, without having a remedy in the courts of justice. It seems to have been conceded, that such a right exists, from the necessity of the case; and it is not for us to decide so grave and so important a question, be-

fore some individual shall complain that his rights have been invaded.

The doctrine contained in the charge given by the court, cannot be sustained in law. If it is admitted that in times of war and danger, the property of the citizen may be seized and used for the benefit of the community, it does not follow, that he loses the right to reclaim it, after the necessity which induced its seizure has passed away. He may have a rightful demand against the government, if his property has been lawfully taken or destroyed in the public service, but his title to it can alone pass from him by his own act and consent; and until such consent is freely given, he is to be considered for all purposes as its owner, until time shall have divested his right of property.

The facts of this case, as disclosed by the bill of exceptions, establish the conversion by the defendant beyond all question, if they are true; and his orders, admitting them to be legal, (as to which, it is unnecessary to express, at this time, any opinion,) afforded no justification or excuse for not returning the horse when demanded, still less for disposing of him for his own use.

Let the judgment be reversed, and the cause remanded.

Gray vs. Crocheron.

GRAY vs. CROCHERON.

1. The wrongful taking or detention of a personal chattel, or other illegal assumption of ownership, or using or misusing of it, amount to a conversion.
2. So, a temporary conversion will make a defendant liable; as, if one ride a horse, or control the services of another's slave, though he afterwards restore them to the true owner—the cause of action, which was once perfect, still remains, and the restoration will only go in mitigation of damages.
3. If a slave be lost, during the time he is employed by a defendant, without the owner's consent, defendant is liable in trover to the full value of the slave.
4. But if the employment be at an end when the slave is lost, defendant will only be liable for the temporary conversion, and the measure of damages, instead of being the value of the slave, will be the injury resulting to the plaintiff, from the employment, which, under some circumstances, may possibly be increased.

Error to the Circuit court of Autauga.

Trover for a slave, tried before *Harris, J.*

The plaintiff in error brought an action of trover in the Circuit court of Autauga, against the defendant, for the conversion of a slave. The defendant pleaded "not guilty," and the case was submitted to the jury. On the trial, a bill of exceptions was taken by the plaintiff, from which it appeared to be probable that the slave alleged to have been converted, was sent across the Coosa river with a letter, by the defendant. The slave was the ferryman at that place, and was afterwards missing. His clothes were found about twenty yards

above the ferry landing, and the skiff and flat belonging to the ferry, were at their proper places. The plaintiff's counsel requested the court to charge the jury, that if they believed that the slave was the property of the plaintiff, and that the defendant employed him without the assent of his master, such employment amounted to a conversion, and unless the slave had thereafter been restored or come to the possession of the plaintiff, that the plaintiff was entitled to recover, which charge the court refused to give, but charged the jury, that if they believed the slave was lost while in "the employment of the defendant, then the defendant was liable for the value of the negro; but if they believed the slave was not lost while in the employment of the defendant, but came to his death in another manner, that then, the defendant was not liable." To all which, the plaintiff excepted, &c.

Plaintiff in error assigned—

1. That the court erred in refusing the charge prayed for;
2. That the court erred in the charge given.

Geo. Goldthwaite, for the plaintiff in error.

Thorington, contra.

Goldthwaite, for the plaintiff in error, contended, that the employment of the slave without the assent of the owner, was a conversion for which trover could be maintained—(6 Bac. Ab, 679; 1 Stark. Rep. 173; 4 T. R. 364; 3 Stark. Ev. 1493; 2 J. J. Mar. 84; 2 Salk. 255.) That if the slave had been re-delivered, or returned by

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defendant, he would still have been liable, and that the return would have gone only in mitigation of damages —(1 Roll. Abr. 5; Bull. N. P. 46; 6 Bac. Ab. 679; 3 Camp. 396; 1 Chit. Pl. 155; 5 Mass. 104; 6 Mod. 312; 10 John. 172; 7 John. 254; 3 B. & A. 687; 2 Saund. Ev. 476.)

COLLIER, C. J.—In *St. John vs. O'Connel, use, &c.* (7 Porter's R. 466,) it was decided, that the wrongful taking or detention of a personal chattel, or other illegal assumption of ownership, or using or misusing of it, were all acts, amounting to a conversion. So, a temporary conversion will make a defendant liable; as, if a person ride the horse, or control the services of another's slave, though he afterwards restore them to the owner, the cause of action, which was once perfect, still remains; and the restoration will only go in mitigation of damages.

Taking these rules for our guide, we think it clear, that the judge of the Circuit court could not, with propriety, have refused the motion of the plaintiff's counsel for instructions to the jury. The first branch of the motion merely assumed it as law, that if the defendant employed the plaintiff's slave, without the master's assent, he was guilty of a conversion.

The second branch supposed, that if after the employment of the slave by the defendant, he came, or was restored to the plaintiff's possession, he could not recover. In this, the plaintiff's counsel yielded more to the defendant than he could have claimed, for the return of the slave, after an unauthorised employment, would only

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have diminished the damages, without destroying the right of action.

The charge given was not a fair substitute for that which was asked, and considering the facts disclosed by the bill of exceptions, cannot be maintained. The jury were informed, that if the slave was lost while in the defendant's employment, the defendant was liable in damages to the extent of his value, but if he was not *thus lost then*, the defendant was not *liable*. The first part of the charge is well enough, but the latter part, referring to the rules we have laid down, is clearly erroneous. Shall the illegal use of the services of the slave, which was *in itself a conversion*, be placed out of view, if he happen to be lost after he has completed that service? We have already shown that the reverse is the law.

That the defendant is chargeable, if the slave was lost during the time he was employed by the defendant, without the plaintiff's consent, and that even to his full value, is indisputable; but if the employment was at an end when the slave was lost, though the defendant would be liable for the temporary conversion, yet the measure of damages, instead of being the value of the slave, would be the injury resulting to the plaintiff from such employment, which, under some circumstances, might possibly be increased.

The slave in controversy appears to have been the *ferryman* of the plaintiff, and might therefore be considered in his owner's possession, on either side of the river; unless controlled by some one else. If, in crossing the river, to carry a letter for the defendant, he was lost, the defendant would be compelled to make good his value;

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but if after having reached the other side of the river, and discharged his errand, he was lost, while following the inclination of his own will, the defendant would be liable only for the temporary conversion. We have thought it proper thus to state the law, which is applicable to this case, that it may be correctly determined upon at a future trial. It remains but to say, that the judgment of the Circuit court must be reversed, and the cause remanded.

WRAGG VS. THE BRANCH BANK OF ALABAMA AT MOBILE.

1. Where the place of holding court is left blank in a writ, and the defect is in no way cured by appearance or otherwise—judgment cannot be rendered for plaintiff.

Error to the Circuit court of Mobile.

Assumpsit, tried before *Pickens, J.*

In this case, the place of holding court was left blank in the writ: there was no appearance by defendant, and judgment was rendered for plaintiff—to reverse which, a writ of error was sued out.

Plaintiff assigned for error—

1. That the writ is not made returnable in any court, and that defendant in the court below had no notice of the suit;
2. That judgment was given for the defendant in error, when it should have been given for plaintiff in error.

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Campbell, for the plaintiff in error.

Thornton, contra.

PER CURIAM.—There is nothing in the writ, which is the foundation of these proceedings, which could in any manner advise or notify the defendant to the action, that he was required to appear at the Circuit court of Mobile county, to answer the plaintiff. The omission to insert the word Mobile, in the blank space in the writ, leaves it without sense or meaning, and it would be carrying the doctrine of intendment too far, to insist that the defendant was bound to know from the service of this writ on him, that he was thereby required to attend at the court which rendered judgment against him. The defect has in no way been cured, by appearance or otherwise.

Let the judgment be reversed.

Heirs of Capal vs. McMillan, adm'r.

HEIRS OF CAPAL vs. M'MILLAN, adm'r.

1. In adjusting the meaning of any of the provisions of a will, the testator's intention is allowed to exert a controlling influence—if that be clear, and not contrary to law, it must prevail, although in giving effect to it, some words should be rejected, or so restrained in their application, as to change their literal meaning.
2. Where the testator's intention would be advanced, courts have sometimes taken license not only to reject, but even to supply words.
3. If a *will* be ambiguous in any particular part, the whole *will* may be considered, for the purpose of ascertaining the testator's intent in that part.
4. As the property devised or bequeathed to infant devisees—legatees, most usually goes into the possession of their guardians, after the executor shall have collected the estate of the testator, and paid his debts; in order to allow it to remain with the executor, or to receive any other than its accustomed destination, the intention of the testator should appear from plain language, or clear implication.
5. In the construction of powers as well as wills, the intention of the parties, if compatible with law, governs the court.
6. In general, the intention is to be collected from the instrument creating the power; though a reference is sometimes allowable to the circumstances under which the power was given.
7. But where two intentions appear, a general and a particular one, such a construction shall be given to the power, that the general intention shall take effect, even if the particular intent be defeated.
8. Where a studied regard to accuracy and precision of language in a *will*, is not discovered—the sense in which the testator employed terms, and the meaning he affixed to them, must be ascertained in determining his intention.

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9. A mother has the second title to the guardianship by nature, which becomes paramount by the death of the father,—yet the guardian by nature is not entitled to possession of the child's estate.
10. The words of a testator are to be taken in their *ordinary* meaning, and not in their *technical* sense.
11. Where property is left by a testator to his minor children, to be given them when they respectively arrive at the age of twenty-one years, or marry, and to be managed by his widow during her widowhood—the control of the property by the widow ceases upon her marriage: and the right to the possession and control of the property, vests in the guardian of the minors.

Error to the Circuit court of Wilcox county, exercising chancery jurisdiction.

Tried before Judge *Crenshaw*.

The bill, in this case, stated that the father of complainants, before his death, (which took place in eighteen and thirty,) made his will—which contained the following clauses:

"Secondly.—I will and bequeath unto my son William, and my son-in-law, Young W. Grayson, the following negroes, to wit, a negro man named Allen, and his wife Aggey, and their three children, Cæsar, Altamore and Amey, with their future increase.

"Thirdly.—I will and bequeath unto my son-in-law, Young W. Grayson, one yellow horse, named Dunganon, and a good bed and furniture, as his full part and portion of my estate.

"Fourthly.—I will and bequeath unto my son, William M. Capel, a certain negro boy named Albert, to be considered as payment of what I am, or would be due to him, for property of his that came into my hands. I

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also will and bequeath unto my son William Capel, one grey colt, a good bed and furniture, and my silver watch,—the watch to be given him when he arrives at twenty-one years of age—as his full part and portion of my estate.

“Fifthly.—I will and bequeath unto my beloved wife, Sally Capel, one negro man named Nelson, and his wife Esther and child Amelia, for and during her natural life, and at her death, the negroes so bequeathed, with their future increase, to be equally divided amongst my heirs, not already provided for. It is also my will, that my wife, Sally, shall have the use of the other negroes, during her widowhood, to wit, Amey, Sukey and London, and to be kept by her during the time aforesaid, for the purpose of assistance in supporting her and the children. I also will and bequeath unto my beloved wife, one bay mare, and one grey mare, and one Indian horse, during her widowhood, and at her marriage, to be divided amongst the rest of my heirs, not provided for.

“Sixthly.—It is my will and desire, that my negroes, not bequeathed, be hired out yearly, and my plantation rented by my executrix and executor, hereinafter appointed; and that my wife, Sally, should be entitled to receive out of the proceeds thereof, the sum of two hundred dollars, in each and every year, for the support and education of the children, during her widowhood, or until my son, Alexander, shall arrive at the age of twenty-one years.

“Seventhly.—It is my will and desire, that all my stock of cattle and hogs, should remain unsold, for the use, support and maintenance of my family. It is also my will, that

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all my household and kitchen furniture, should remain unsold, for the use of my wife, Sally, and the children.

"Eighthly.—It is my will, that all my negro property, land, stock of every description, and all my estate, both real and personal, except that specially bequeathed to my son-in-law, Young W. Grayson, and my son, William M. Capel, shall be divided among my younger children, (meaning the complainants,) equally, and that they shall be entitled to receive the same, when they arrive at the age of twenty-one years, or marry, except the property already bequeathed to my wife.

"Ninthly.—I appoint my wife, Sally, executrix, and Irwin R. Capel, executor, of this, my last will and testament."

That shortly after the death of the testator, the executor, Irwin R. Capel, also departed this life: and that Sally Capel, took upon herself the execution of the will, and in November, eighteen hundred and thirty-one, intermarried with John Nugent, the present guardian of complainants: That said Sally was thereupon displaced from the office of executrix, by the Orphan's court of Wilcox, and Alexander Gordon, appointed administrator, —who settled the estate, and resigned the administration.

David McMillan, the defendant, by virtue of his office of coroner of the county, was then appointed, administrator *de bonis non*, with the will annexed, who possessed himself of the estate: That complainants were the younger children, and that William M. Capel, Young W. Grayson, and Sally, have received their bequests as mentioned in the will, and that the residue of the estate is in the

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hands of defendant, who had annually hired out the same, and that it had considerably increased.

Complainants, in eighteen hundred and thirty-four, removed to Mobile, where their father-in law, John Nugent, was appointed their guardian: That the negroes could be hired out in Mobile to better advantage than in Wilcox, and that it would be greatly to the injury of complainants, to permit defendant to manage the property, until they arrived at mature years, and that some competent person in Mobile ought to be appointed to manage the property. Complainants, from their youth, were unable to do any thing for their own support, and were maintained by their father-in-law, the amount allowed them by defendant being inadequate for their maintenance; and that their guardian had applied to the defendant for the property, and for a settlement, which had been refused. Complainants prayed for an account, and that the property might be transferred to their guardian.

The answer admitted the statement contained in the bill, and furnished an account and schedule of the estate in the hands of defendant—had no objection to surrendering the estate, which consisted of twenty negroes, sundry notes, lands, &c. if the court should so order—thought the negroes would be exposed to injury in health and morals, by removing them to Mobile, and doubted the competency of the guardian to manage the estate.

The chancellor was of opinion, that the will required that the estate should remain in the hands of the executors, until the children arrived at the age of twenty-one years, or married, and that the court had no right to remove an executor without cause: That a guardian is not

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entitled to the possession of the ward's property, unless the right of possession vests in the ward. The court thought the negroes would be liable to receive injury by a removal to Mobile, and would have been inclined to dismiss the bill, but for the suggestion, that the amount allowed the minors' by the administrator, was insufficient for their maintenance. It was therefore referred to the master, to ascertain what would be a reasonable allowance for the maintenance and education of the minors.

The master, at a subsequent term, reported a definite sum, and his report was confirmed by the court.

Assignment.—That the chancellor erred in decreeing that the property of the wards should be retained and held by the administrator, and in not decreeing the same, to be, by the said administrator, the defendant in error, surrendered to the plaintiffs.

Porter, for plaintiffs in error.

J. B. Clarke, contra.

COLLIER, C. J.—The only question arising in this case is, whether the defendant, as administrator *cum testamento annexo*, is entitled to the possession of the property devised and bequeathed by his testator to the plaintiffs, or does its possession and control properly belong to their guardian? Assuming the defendant to stand in the attitude of an executor, the solution of this question will depend upon the exposition of the sixth and eighth clauses of the testator's *will*; which are as follow :

“Sixthly.—It is my will and desire, that my negroes

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not bequeathed, be hired out yearly, and my plantation rented by my executrix and executor, hereinafter appointed; and that my wife, Sally, should be entitled to receive, out of the proceeds thereof, the sum of two hundred dollars, in each and every year, for the support and education of the children, during her widowhood, or until my son, Alexander, shall arrive at the age of twenty-one years.

"Eighthly.—It is my will, that all my negro property, negroes, land, stock of every description, and all my estate, both real and personal, except that specially bequeathed to my son-in-law, Young W. Grayson, and my son, William M. Capel, shall be divided among my younger children equally, and that they be entitled to receive the same, when they arrive at the age of twenty-one years, or marry, except the property already bequeathed to my wife."

It will be observed, that the will does not, in terms, prescribe any period during which the executrix and executor shall continue to hire out the negroes and rent the land. To be informed upon this point, then, we must look to the will itself, to ascertain the testator's intention, in thus diverting the property from the control of the guardian of the legatees, and vesting his legal representatives with the unusual authority, to retain its possession and management. As wills are often made *in extremis*, and drawn by persons unskilled in the law, without the aid of professional advice, great liberality is indulged in their interpretation. In adjusting the meaning of any of the provisions of a will, the testator's intention is allowed to exert a controlling influence;—if

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that be clear, and not contrary to law, it must prevail, although, in giving effect to it, some words should be rejected, or so restrained in their application, as to change their literal meaning—(Finlay et al. vs. King's Lessee, 3 Pet. R. 377; Bell and wife vs. Hogan, 1 Stew. R. 536; Drury & Bennett vs. negro Grace, 2 Har. & J. R. 356; Smith vs. Bell, 6 Pet. R. 68.) And where the testator's intention would be advanced, courts have sometimes taken license not only to reject, but even to supply words.—(Doe vs. Roe, 1 Wend. Rep. 541; Jackson, *ex dem.* of Gatfield vs. Strang, 1 Hall's Rep. 1.) So, if a *will* be ambiguous in any particular part, the whole *will* may be considered, for the purpose of ascertaining the testator's intent in that part—(Jackson *ex dem.* Van Vechten vs. Sill, 11 Johns. R. 201; Dashiel et al. vs. Dashiel, 2 Har. & Gill's R. 127; Land et al. vs. Otley, 4 Rand. R. 213; Moore vs. Dudley and wife, 2 Stew. R. 170.)

As the property devised or bequeathed to infant devisees or legatees, most usually goes into the possession of their guardians, after the executor shall have collected the estate of the testator and paid his debts, in order to allow it to remain with the executor, or to receive any other than its accustomed destination, the intention of the testator should appear from plain language or clear implication—(Roosevelt vs. Fulton's heirs, 7 Cow. R. 71; Jackson *ex dem.* Bogert vs. Schaubert, 7 Cow. R. 187.)

As the authority given to the executrix and executor, by the sixth clause of the will, is a power in nature of a trust, it may be well to lay down some rules, in regard to the interpretation of powers: In the construction of powers as well as wills, the intention of the parties,

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if compatible with law, governs the court—(Pomery *vs.* Partington, 3 T. R. 665; Smith *vs.* Doe *ex dem.* Jersey, (Earl) 3 Bligh's R. 290; 7 Price's R. 281; 3 Moore's R. 339; 2 B. & B.'s R. 474; Tankerville *vs.* Coke, Mosely's R. 175, (a); Liefe *vs.* Saltingstone, 1 Mod. R. 189; Talbot *vs.* Tipper, Skinner's R. 427; Bristow *vs.* Ward, 2 Vea' jr. 547; Wilson *vs.* Troup, 2 Cow. R. 195; Jackson *vs.* Vreeder, 11 Johns. R. 169; Mitchell *vs.* Maupin, 3 Monroe's R. 185.) In general, the intention is to be collected from the instrument creating the power, though a reference is sometimes allowable to the circumstances under which the power was given—(Griffith *vs.* Hanson, 4 T. R. 748; Doe *vs.* Rendle 3 M. & S. R. 99.) But where two intentions appear, a general and a particular one, such a construction shall be given to the power, that the general intention shall take effect, even if the particular intent be defeated—(Robinson *vs.* Hardcassle, 2 T. R. 241; Jackson *vs.* Vreeder, 11 Johns. R. 169; Smith *vs.* Bell, 6 Peters' R. 68.)

Having stated these acknowledged rules, as guides for the judgment we are to pronounce, we proceed to consider the two clauses of the *will*, out of which this controversy has arisen. It will be premised, that the *will* does not discover any studied regard to accuracy and precision in the use of language; we must, therefore, in determining the testator's intent, endeavor to ascertain the sense in which he employed terms, and affix to them the same meaning.

That the mother has the second title to the guardianship by nature, which title becomes paramount upon the death of the father, is a clear principle; yet, the guardian

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by nature is not entitled to the possession of the child's estate—(Miles vs. Boyden, 3 Pick. R. 213; 5 Porter's R. 392; Isaacs, by next friend, vs. Boyd et al.)

The testator manifests a confidence in the judgment and discretion of the wife, so long as she continues unmarried; and is desirous that during that period, she shall direct the education of their children; and to effect this object, and enable her to receive the means for that purpose, he directs that the negroes not previously bequeathed, shall be hired out, and his plantation rented by his executrix (wife) and executor, and his executrix to receive out of the proceeds thereof, two hundred dollars, at the end of every year.

The will does not leave it to be determined by construction, for what particular time this sum is to be received and appropriated by the executrix: its terms are explicit, and provides a limitation, viz. "during her (wife's) widowhood, or until my (testator) son, Alexander, shall arrive at the age of twenty-one years." The events which are to determine the right of the executrix to receive money for the support and education of the children, need not both happen;—they are expressed disjunctively, so that the one which shall first occur, puts an end to the right. The moving cause for the insertion of the power to hire out the negroes, and rent the plantation, was to enable the wife to receive a part of the proceeds arising from these sources, to defray the expenses, consequent upon the support and education of the children, without executing a bond, as their guardian, or giving other security than that required for the faithful performance of her duties, as an executrix of the will.

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The inducement which prompted the testator to confer this power, ceased to exist immediately upon the marriage of the executrix, for her widowhood no longer continuing, her right to receive the two hundred dollars was at an end.

This view derives aid from the fifth clause of the will. In the first part of this clause, the testator makes a provision for his wife for *her life*. In the latter part, he says: "It is also my will, that my wife, Sally, shall have the use of the other negroes during her widowhood, to wit, Amey, Sukey and London, and to be kept by her during the time aforesaid, for the purpose of assistance in supporting her and the children.

I also will and bequeath unto my beloved wife, one bay mare, and one grey mare, and one Indian horse, during her widowhood, and at her marriage, to be divided amongst the rest of my heirs, not provided for." The wife's right to the property bequeathed by this clause, did not continue beyond the period of her marriage: upon the happening of that event, the guardian of the heirs intended, became entitled to its *actual* possession. The children provided for by the sixth, are doubtless the heirs contemplated by the fifth clause, and it is difficult to conceive of a motive to a change of the possession of the property in the one case, which would not have influenced the testator in the other.

The testator certainly desired that the maintenance of his children should be transferred to some one else, as soon as his wife should again marry, or, at least, he did not wish the proceeds of their estate to be received and disbursed by her for that purpose, in the character of an

executrix. He was willing to confide to her this important duty, so long as she continued in a situation to exercise her own judgment and discretion uncontrolled by a husband, but as he could not anticipate who was to succeed him in her affections, he was unwilling that the possession of the property, and the disposition of the fund provided by the will, should be entrusted to his wife, beyond the period of a second marriage. And if the wife made a prudent selection of a second husband, neither the children or mother would be prejudiced by thus interpreting the testator's intent, for the husband would doubtless be appointed by the court, guardian of the children under fourteen years, and if chosen by those older, he would certainly be approved—but if the wife's choice was unfortunate, it would not be desirable that the guardianship should be committed to the husband.

Perhaps it may be said that it may have been the confidence reposed in the executor named in the will, that influenced the testator in framing, as he did, the sixth clause. The will no where discovers that such a consideration prompted him. A confidence in the wife, so long as she continued sole, we think has been shewn to have been the moving cause. The executor was most probably named for the purpose of aiding the wife in the performance of duties, which, to her, must have been onerous, viz. to hire out the negroes, and rent the plantation.

Nor do we consider that there is any thing in the eighth clause, repugnant to the view we have taken. The direction, there, that the *younger children* shall be entitled to receive the property given them by the will, when they arrive at the age of twenty-one years, or marry,

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does not inhibit a guardian of the children from taking possession of it previously. The testator did not employ words in their technical sense, but in their ordinary acceptation, and so we must understand them—(Land et al. vs. Otley, 4 Rand. R. 213.) Now, though the possession of the guardian would, by construction of law, be the possession of the ward, yet, as the testator evidently intended an *actual* possession, with the right to control the property. (this being the popular meaning of the words employed,) in furtherance of his intention, he must be so understood. The words, "except the property already bequeathed to my wife," clearly relate to property bequeathed to the wife during her life, and which, after her death, is directed "to be equally divided amongst my (testator's) heirs, not already provided for," and does not embrace that given during widowhood, to aid the wife in the support and education of the children.

There is no conflict between the general and particular intent of the testator, in framing the sixth clause of his will. His intention was to provide for his children, not specially provided for, a patrimony, and also the means of support and education during their minority. The expenditures for the support and education of the children, were to be regulated by the wife during her widowhood: after her marriage she was not authorised to receive the proceeds of their estate, to defray the charges of their maintenance. This, we think, indicates the testator's intent to have been, that as the executrix was to receive a portion of the proceeds of the children's estate, in order to their support and education, the possession of the estate itself is vested in her and her co-execu-

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tor, that she might perform this duty with the more ease and convenience to herself. Besides, the testator probably believed, that so long as he remained single, the interest of her children would be paramount to that of all other persons, and consequently, their estate would be most profitably managed by her, but as the interest of a husband might conflict, or his will would predominate, whenever she changed her situation, he intended the power given by the sixth clause to cease, and the property to go into the possession of such person or persons as might be regularly approved and appointed to the guardianship of the infant plaintiffs.

That the intent of the testator may be effectuated, the decree of the Circuit court is reversed, and the cause remanded. And it is further adjudged and decreed, that such proceedings be taken in the Circuit court, as may lead to a settlement of the administration accounts of the defendant, upon such principles as may be just and proper. It is further ordered and adjudged, that upon the execution of a bond or bonds by John Nugent, as guardian, &c. in a sufficient penalty, and with adequate security, before the judge of the County court of Mobile or Wilcox county; conditioned as the bonds of guardians are by law directed to be, *to be approved by the judge of the Circuit court of Wilcox*; that then the defendant be directed to pay over to the guardian all monies, and deliver to him all bonds, notes and slaves, and relinquish to him the possession of the lands belonging to the infant complainants, and the costs of this cause, are to be paid by the defendant, out of the estate of the testator in his hands unadministered.

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1. It is a well settled rule of chancery, not to decree on a case supported by proof, and not sustained by the allegations of the pleadings. The allegation and proof must correspond.
2. There is a broad and clearly defined distinction between trusts of property, which are specific in their nature, and trusts of money, which have no earmarks by which they can be identified.
3. But there is no difference between a trust created by the deposit of money in the first instance, and one where the money is raised by the sale or conversion of a chattel deposited with a trustee, to convert into money.
4. Whenever the subject matter of a trust can be sued for at law, the statute of limitations may be insisted on as a bar, although the remedy is pursued in a court of equity.
5. The only trusts not within the operation of the statute, are those which are peculiarly and exclusively, the subjects of equity jurisdiction.
6. A subsisting recognised and acknowledged trust, as between the trustee and the *cestui que trust*, is not barred by the statute of limitation:
7. If specific property is placed in the possession of any one, in trust for a specific purpose, as long as it remains in specie, and capable of identification, it is considered as held subject to the trust, until such time as the trustee shall do some act evincing his intention to convert it to his own use, or to renounce or abandon the trust confided to him; and in all such cases, between the trustee and *cestui que trust*, such intention must be known or communicated to the trustee, otherwise, the property will be considered as remaining subject to the trust.
8. But this rule has never been applied to mere money trusts, when the fund has not been kept distinct and separate from other funds belonging to the trustee.

8p	211
95	222
8p	211
100	222

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9. The fact, that action can be maintained for money received on one of numerous demands, does not revive all previous causes of action, and the payment of one claim cannot be construed as an admission of another.
10. If, at the time of a testator's death, there is any specific personal property, in his hands belonging to others, which he holds in trust, or otherwise, *and it can be clearly traced and distinguished from the testator's own*, such property, is not assets to be applied to the payment of his debts, or to be distributed among his heirs, but it is to be held as the testator himself held it.
11. But if the testator has *money, or other property*, in his hands belonging to others, which is in trust or otherwise, and it has no ear marks, and is not distinguishable from the mass of his own property, the party must come in as a general creditor.
12. And the rule above stated, as governing cases where the trustee is dead, extends with all its force, to money trusts where the testator is living.
13. As long as the trustee holds it capable of being distinguished as a separate fund distinct from his own money, the trust will be presumed to exist, from the circumstance that it is thus kept distinct, for this could alone be the case where the trust was recognised and admitted.
14. But if the trustee receives money on account of the subject matter of the trust, and does not separate it and keep it so that it can be identified, a continual conversion is constantly taking place, and if the *cestui que trust* lies by for more than six years, or such other time as will create a statutory bar, the presumption of payment will arise as in any other case of a mere money demand, and the *onus* is thrown on the party, claiming the money, to repel the presumption as in other cases.
15. It is now well settled, that if a defendant, by plea or answer, relies on the statute of limitations, as a defence—the plaintiff, if he wishes to bring his case within any of its exceptions, must amend his bill or file a special replication, so that the new matter introduced by him may be controverted or avoided by the opposing party.
16. And the act of eighteen hundred and twenty-three, dispenses

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only with the merely formal replication, before necessary, and does not authorise the introduction of evidence, not applicable to any previously made allegation.

17. The same strictness in an answer to a bill in equity, where the statute of limitations is relied on as a defence, is not requisite, as in a plea.
18. Cases of bailment and unwritten contracts, when the contract is *expressed*, and the duties defined, are not open contracts in the view of the statute of limitations, and therefore, actions founded on them are not barred in three years.
19. Where a defendant in equity wishes to bring the case charged in complainant's bill, by evidence, to be one of open account, he must make the necessary allegations of facts, by his plea and answer.
20. The mere statement of an account before auditors, for the purpose of facilitating the examination of matters before them, is not a revival of a demand barred by statute.
21. Nor is the correction of an improper judgment, or a payment made on it at the instance of a representative, an admission of other demands, as claims existing, due and unpaid, by a defendant.
22. The interest of one of several co-distributees is several, and does not, at his death, pass to his co-distributees. A distributee may, in his turn, become the foundation of a new stock, who may be persons other than those entitled with him to distribution.
23. A transfer of the interest of one of several distributees, parties to a particular suit, does not remove his disqualification, when offered as a witness in the cause.
24. And a bill will not be dismissed, without prejudice, to enable such a witness, in a future suit, to tender a suitable release to restore his competency.

Error to the Circuit court of Lawrence county, exercising chancery jurisdiction.

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Bill for discovery and relief, tried by *Coleman, J.*

The bill was filed by the sheriff of Lawrence county, who, *ex virtute officii*, had been appointed administrator of the estate of Maury. The intestate had placed in the hands of Mason, in October, eighteen hundred and twenty-one, a large number of notes, bonds and accounts, amounting to more than nine thousand dollars,—who undertook and promised to collect them. Collections were made in specie, or in par or premium bank notes, or in depreciated currency, at the usual rates of discount, varying from twenty to thirty per cent. Mason made some payments on them to Maury, some of them in depreciated paper, the discount on which was a loss to Maury and a gain to Mason; but a large sum, (say three thousand dollars,) remained in his hands unaccounted for. The bill prayed for a discovery and account.

The answer admitted, that defendant's intestate had received the notes, bonds and accounts to collect. The notes, &c. were payable to one Daniel W. Maury, who was a son of complainant's intestate, and who had formerly kept a store in Lawrence county, where he received the notes, &c. and had transferred them to his father, who deposited them with Mason for collection. Mason undertook the collection, more to save an old friend from injury, than from any motive of interest; and the answer alleged that he had fully paid over the amount he collected—some of the demands not having been collected. As Maury and Mason were intimate friends in their life time, defendant had no doubt they had fully settled with each other, and as the whole claim made by the bill was a stale demand, and in the

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opinion of defendant, without equity—defendant insisted it was wholly barred by the statute limiting the time in which suits should be instituted, and insisted upon the statute by way of plea. The answer was accompanied with an exhibit of such receipts and memoranda, as defendant was able to collect from the papers which had come to his hands.

The case was committed to certain auditors appointed by the court, to examine and report upon the state of the accounts. Daniel W. Maury, a distributee of the estate of Maury, executed a release of his interest, and was a principal witness in the case. The report found a balance due complainant, of eight hundred and eighty-seven dollars and two cents.

Upon the hearing of the case, it seemed to the chancellor that the statute of limitations applying to the case was that of three years, and as there was no circumstance to operate against its being a bar, the opinion of the court was, that the plea of the statute should be sustained. The bill was therefore dismissed.

Assignments of error :

1. The chancellor erred in dismissing the bill and decreeing against the complainant, and for the defendant.
2. The chancellor erred in sustaining the plea of the statute of limitations.
3. The chancellor erred in not rendering a decree in favor of the complainant, for the balance of the account allowed him by the report of the auditors; and also the exchange and interest thereon, which he claimed.

Hopkins, for the plaintiffs in error.

GOLDTHWAITE, J.—The decree of the Circuit court, dismissing the bill, is predicated on the supposition, that the statute of limitations presents a complete defence, and the plaintiff in error has assumed several positions to convince us that this decree cannot be supported. These positions will be severally noticed.

1. It is said the notes and other evidences of debt, deposited with Mason (the defendant's intestate,) for collection, were *assigned* to him, to enable him to collect the monies due thereon, and thus a direct trust was created, which it is contended cannot be barred by the statute of limitations. It may be remarked, in answer to this, that nothing is said in the bill of any assignment whatever, nor is the assertion supported by any evidence in the cause, unless the circumstance of Mason's prosecuting a suit in his own name on one, or perhaps more than one of the notes deposited with him, is to be taken as proof of an assignment. Whatever may be the effect of the proof in showing this fact, it is the well settled rule of chancery, not to decree in a case supported by proof, and not sustained by the allegations of the pleadings. The allegation and proof must correspond—(Clink vs. Tatom, 11 Vesey, 240; Smith vs. Clark, 12 Vesey, 277; James vs. McKernon, 6 John. 543; Beach vs. the Fulton Bank, 3 Wend. 573; Pratt vs. Northam, 5 Mason, 113; Barn vs. Chiles, 10 Peters, 177; Morrison vs. Hart, 2 Bibb, 4; Lemaster vs. Burckhart, 2 Bibb, 25; Langon vs. Henderson, 1 Bland. 236; Inston vs. Child, 1 Bro. C. C. 94; Bogman vs. D'Vaughan, 3 Stew. 243.)

But if the notes and other evidences of debt had been assigned to Mason, and this fact was alleged in the bill,

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this circumstance would not have the effect to change the character of the trust fund, when the money was collected. There is a broad and clearly defined distinction between trusts of property, which are specific in their nature, and trusts of money, which has no marks by which it can be identified. This distinction will be hereafter adverted to and explained; but there is no difference between a trust created by the deposit of money in the first instance, and one where the money is raised by the sale or conversion of a chattel deposited with the trustee to covert into money. To make a distinction in such a case, would savor more of refinement and ingenuity, than of practical utility, and its introduction as a rule of action, would unsettle some useful and well established principles.

We are not authorised to depart from the case which the complainant has thought proper to present by his bill, which alleges the deposit with Mason, of a large amount in value, of notes and other claims, which were to be collected by him for the benefit of the complainant's intestate. It alleges further, that the money due on their claims has been collected, and never accounted for or paid over. Here we find no allegation of a specific trust created, nor does the complainant seek to pursue a specific trust fund; it is the usual form of a bill for discovery of monies collected by an agent, seeking no other decree or relief, than for payment of whatever sum may be found to be due, and it might well be questioned whether such a bill is not alone cognizable in equity, on the matters of discovery and account.

Very soon after the enactment of the statute of limita-

tions, we find the English Court of Chancery holding it to apply to cases in equity, although such cases are not within the words of the act, but notwithstanding its application *in general*, cases of trust were never held within its operation. In the earlier cases, the rule is laid down very broadly, that all trusts whatsoever were excluded; and the case of *Locky vs. Locky*, (Prec. in Chan. 518,) is the first case in which a distinction as to the several kinds of trusts was attempted. The cases decided previous to *Locky vs. Locky*, certainly contain the rule, as contended for by the counsel for the plaintiff in error. These cases are four in number, and are not satisfactorily reported, as they furnish nothing more than the facts of the case, and the decision of the court—(*Harrison vs. Lucas*, 1 Chan. Rep. 67; *Heath vs. Henley*, 1 Ch. Cases, 20; *Shelden vs. Wildman*, 1 Ch. Cases, 26; *Lord Hollis' case*, 2 Vent. 345.)

It must have very early recurred to the chancellors, that by the withdrawing of all trusts from the operation of the statute, there would remain very few subjects for its action, as every bailment, every transaction by an agent or factor, and indeed every case in which the smallest trust or confidence was reposed, might thus be withdrawn, by the plaintiff's seeking his relief in equity. The case of *Locky vs. Locky*, (Prec. in Chan. 518,) was, however, soon interposed, to arrest the growing evil of such a construction as had been previously given. Lord Macclesfield then decided: "when one receives the profits of an infant's estate, and six years after his coming of age, he brings a bill for an account, that the statute of limitations is a bar to such suit, as it would be to an ac-

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tion of account at common law: for the receipt of the profits of an infant's estate is not such a trust, as being the creature of a court of equity, the statute shall be no bar to,—for he might have had his action of account against him at law, and therefore no necessity to come into this court for the account; but the reason why such bills are brought here, is from the nature of the demand, that they might have the discovery of books, papers, and the party's oath, for the more easy taking of the account, which they cannot so well do at law; but if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court, and there is no sort of difference in reason between the cases."

This case draws the line with much precision and accuracy between those trusts which are, and those which are not barred by the statute. If it be *the mere creature of a court of equity*, the trust is not affected by the statute: all those for which there is *a concurrent remedy at law*, are within the statute, and it matters not in what forum relief is sought. This case has ever been considered the leading one to show the distinction between the cases within and without the statute, and subsequent decisions have established its authority. A review of the cases would be an unnecessary consumption of time, the more especially, as it has been done by Chancellor Kent in a most satisfactory manner, in a case which will be presently adverted to. A reference to the principal cases may, however, prove useful.—(Prince vs. Heylin, 1 Atk. 493; Brereton vs. Gamul, 2 Atk. 240; Sturt vs. Melish, 2 Atk. 610; Pomfret vs. Windsor, 2 Vesey, sen. 472;

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Smith vs. Clay, 3 Bro. Ch. R. 639; Harmood vs. Oglander, 6 Vesey, 199, 8 Vesey, 106; Stackhouse vs. Barnston, 10 Vesey, 453; Bond vs. Hopkins, 1 Sch. & Lef. 413; Hovenden vs. Lord Annesley, 2 Sch. & Lef. 607; Beckford vs. Wade, 17 Vesey, 87; Medlicot vs. O'Donnel, 1 Ball. & Bently, 156.)

In the case of Decouche vs. Savetier, (3 Johns. Chan. 216,) Chancellor Kent held that no time would bar a direct trust, as between the trustee and the *cestui que trust*, so long as the trust subsisted; and in the case of Coster vs. Murray, (5 John. Chan. 522,) he decided that the statute did not reach to matters of gratuitous bailment or trust. This latter case was affirmed by the Court of Errors, but on other grounds than those assumed by the chancellor. Murray vs. Coster, (20 John. 576,) Chief Justice Spencer, in his opinion, (which was that of a large majority of the court,) holds this language: "I have no hesitation in saying, that in a case where there is a concurrent jurisdiction in the courts of common law and of equity, the rule must be the same, and the statute may be pleaded with the same effect in the one court as in the other. In cases of trusts and frauds, peculiarly, appropriately, and *exclusively* the subject of equity jurisdiction, according to the established doctrine, the statute cannot be pleaded."

The same question again came before Chancellor Kent in the case of Kane vs. Bloodgood, (7 John. Chan. 90,) and he then adverted to the cases decided by him previously, and admitted he was misled by the earlier English cases: he examines his former decisions, and conforms to the rule laid down by Chief Justice Spencer, in

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the case of *Murray vs. Coster*, which rule he strongly fortifies by a most able examination of most of the cases then reported.

In *Trecothick vs. Austin*, (4 *Mason*, 16,) Judge Story quotes the case of *Murray vs. Coster* with unqualified approbation, and the same rule has been recognised in most of the States—(*Lingum vs. Henderson*, 1 *Bland*, 236; *Kinney's ex'ors vs. McClure*, 1 *Rand.* 284; *Benzien vs. Lenoir*, 1 *Car. Law Rep.* 508; *Hamilton vs. Shepperd*, 3 *Murphey*, 115; *Van Rhyn vs. Vincent*, 1 *McCord Chan. R.* 310; *Brackenbridge vs. Churchill*, 3 *J. J. Marshall*, 11; *Heirs of Shelby vs. Shelby*, *Cooke*, 179; *Cook vs. McGinnis*, 1 *Martin & Yerger*, 361; *Hooper vs. Bryant*, 3 *Yerger*, 1; *Armstrong vs. Campbell*, 3 *Yerger*, 211; *Terrell vs. Murray*, 4 *Yerger*, 104.)

The two cases of *Godfrey vs. Saunders*, (3 *Wilson*, 94,) and *Stiles vs. Donaldson*, (2 *Dallas*, 214,) which have been cited by the counsel for the plaintiff in error, seem not to have been decided on the principle of a trust, but they turned exclusively on the question, whether the accounts claimed in the one case, and set off in the other, were within the exception of the statute which relates to accounts between merchant and merchant. Therefore, it is not material to examine the correctness of these decisions, as they turned on a point not involved in this case.

From the cases referred to, these principles may be decided—

1. Whenever the subject matter of a trust can be sued for at law, the statute of limitations may be insisted on as a bar, although the remedy is pursued in a court of equity.

2. The only trusts not within the operation of the statute, are those which are peculiarly and exclusively the subjects of equity jurisdiction. And

3. A subsisting recognised and acknowledged trust, as between the trustee and the *cestui que trust*, is not barred by the statute.

The case under consideration, is one for which the complainant could have sued at law, on the case made by his bill, and although the trust and confidence reposed, as well as the account required, may be sufficient to give jurisdiction to a court of equity, yet that jurisdiction is not exclusive. If the complainant sought a return of the evidence of such claims as remained uncollected, or the transfer and assignment of any securities taken by Mason in satisfaction of any of those claims, being of such a nature that they could be traced and identified, such a case would present matters exclusively cognizable in a court of equity.

2. It is insisted, however, that the proof in this case shows the transaction to have been a recognised and subsisting trust, as late as the latter part of the year eighteen hundred and twenty-six, because Mason then made the last collection. That his representatives so considered in eighteen hundred and thirty, when some money collected by reason of a judgment obtained by Mason, was paid over to the representative of the complainant's intestate, and that the trust must always be considered as subsisting until closed, renounced, or expressly abandoned.

If specific property is placed in the possession of any one, in trust for a specific purpose, so long as it remains

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in specie and capable of identification, it is considered as held subject to the trust, until such time as the trustee shall do some act evincing his intention to convert it to his own use, or to renounce or abandon the trust confided to him, and in all such cases between the trustee and *cestui que trust*, such intention must be known or communicated to the trustee, otherwise the property will be considered as remaining subject to the trust; but it is not understood that this rule has ever been applied to mere money trusts, when the fund has not been kept distinct and separate from other funds belonging to the trustee. It must be borne in mind, that the complainant is not seeking the payment or return of a specific fund separated from other funds of Mason, or which is capable of being traced; but the claim advanced differs in no essential particular from the ordinary claim for money had received to the use of the complainant or his intestate, and must be governed by the same principles which ought to govern such a case, unless peculiar circumstances shall be found to exist, which will authorise the application of other rules.

The general rule is forcibly illustrated by Judge Story, in the case of *Trecothick vs. Austin*, (4 Mason, 16,) where he observes, "executors are charged with no more in virtue of their office, than the administrator of the assets of their testator. If, at the time of his death, there is any specific personal property in his hands belonging to others, which he holds in trust or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stock or other things, is not assets to be applied to the payment

could alone be the case where the trust was recognised and admitted. But when the trustee receives money on account of the subject matter of the trust, and does not separate and keep it so that it can be identified, a continual conversion is constantly taking place; and if the *cestui.que trust*, lies by for more than six years, or such other time as will create a statutory bar, the presumption of payment will arise as in any other case of a mere money demand, and the *onus* is thrown on the party claiming the money, to repel the presumption as in other cases. The adoption of a different rule would, in effect, revive the authority of the earlier English cases on the subject of trusts, of every description, being without the statute of limitations, as every trust must at one period have subsisted and been acknowledged; and in few or none of these cases is there ever an express renunciation or disavowal.

The cases cited, (*Leman vs. Pendleton*, 3 Call, 538, and *Johnston vs. Humphreys*, 14 S. & R. 394,) do not appear to have any application to this distinction between trusts of property and trusts of money, and therefore need not be examined, as they have no bearing on the view which we take of this case. It may, however, be remarked, that the case from *Sergeant & Rawle*, presented a distinct acknowledgment of the identical trust sought to be enforced within the period of the statutory bar.

3. It is insisted that the proceedings had in a former suit against a previous personal representative of Mason, must withdraw this case from the operation of the statute, as the abatement of that suit was a consequence of

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the death of the party defendant, and as that suit could not be revived against the present defendant.

This question is certainly one of much difficulty, and might, under other circumstances, preclude the defence of the statute; but it cannot be examined, because it is not presented according to the established rules of chancery practice. It is now well settled, that if the defendant, by plea or answer, relies on the statute of limitations as a defence, the plaintiff, if he wishes to bring his case within any of its exceptions, must amend his bill, or file a special replication, so that the new matter introduced by him may be controverted or avoided by the opposing party—(Miller vs. McIntyre, 6 Peters' R. 61; James vs. McKernon, 6 Johns. R. 543; Mitford on Plead. 18; Lewis vs. Bacon, 3 H. & M. 89; Starns vs. Starns, 1 Edwards R. 358.) Special replications have gone entirely out of use; and as they tend to introduce a most inconvenient and unnecessary prolixity in pleading, are not permitted to be filed without the leave of the court—(Starns vs. Starns, 1 Edwards' R. 358.) The fifth section of the act of eighteen hundred and twenty-three, (Aik. Dig. 288, s. 17,) which directs that a special replication shall not be required, dispenses with the merely formal replication, which before was necessary to place the answer at issue. It does not authorise the introduction of evidence not applicable to any previously made allegation. To give it the construction to authorise proof of facts not alleged, could only produce surprise in most cases, and uncertainty and confusion in all.

4. It is objected, that the answer is not sufficiently precise in its terms, to raise the defence of the statute of

limitations, because the term of time which creates the bar is not shewn.

The answer is not precise or formal, and if any doubt can arise as to what statute is intended, the complainant is entitled to all the benefit he can derive from this want of precision. The words used by the answer are as follows: "The whole claim being a stale demand, and as the defendant believes, without the shadow of equity, he insists that it is wholly barred by the statute limiting the time in which suits shall be instituted, *and insists on it by way of plea.*"

No precedents giving the form of the *answer*, when this defence is insisted on in that manner, have fallen under our view; but the cases are numerous to shew that the same strictness is not requisite as in a plea—(Price vs. Price, 1 Vernon, 185; Anon. 3 Atk. 70; Hilyard vs. Cressy, 3 Atk. 303; Jones vs. Pengree, 6 Vesey, 580; Bailey vs. Adams, 6 Vesey, 586.) In most of these cases, *pleas* of the statute of limitations were overruled as insufficient, and were ordered to stand as *answers*, with leave to the complainant to except. These authorities are persuasive, at least, to show that no great strictness has ever prevailed as to the *form* of the answer, if the *defence* is sufficiently presented by it. There are, however, a class of cases in equity, as well as at law, which hold that a *plea* of the statute must be such as is properly applicable to the case—(Anon. 3 Atk. 70; Gould vs. Johnson, 2 Salk. 422; Blackman vs. Tidderly, 2 Lord Raymond, 1099.) In Hudson vs. Hudson, (6 Munf. 352,) it is said by the court to be important "that the *term* prescribed by the statute should be *particularly* (though

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not *formally*) pleaded, or relied on, to let in the plaintiff to shew by his replication, that within the time an original had been sued out, if the fact was so." The force of this reason is not perceived, unless two or more statutes could be applicable to the same state of facts. If the statutory bar is always the same on a given state of facts, no reason is perceived why the defendant ought to be required to specify the term given by law in his answer, as it is as well known to the plaintiff as to him. But if the plaintiff is permitted to state his cause of action in such general terms, as to cover, alike, matters which are barred by the statute of three and six years, then a reason would arise why the defendant should, by his answer or plea, set out the circumstances from which he is authorised to claim the bar of the shorter period, or that a general answer or plea should be referred to the longest period—a construction which could be productive of no evil consequences to the plaintiff in any case. Further to illustrate our views, a reference may be had to the forms of declaring in assumpsit on the common counts. Under those common counts, or under many of them, a promissory note would be receivable in evidence, and so would the items of an open account, properly so called. It would seem from this fact, that a plea of the statute of limitations of three years would not be a good plea to such a declaration, unless it contained the averment, that the cause of action arose from an open account. In Kentucky, where a statute similar to our own, is in force, this is the form used in pleas of this character—(Dyott *vs.* Letcher, 6 J. J. Marshall, 541.)

We will not undertake to determine, at this time, what

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is an open account within the meaning of our statute. Perhaps it will at all times be found easier to determine the cases which are not such, than to define with accuracy and precision all those accounts which may be classed as such. The bill alleges, that the complainant's intestate placed in the hands of the defendant's intestate, a large amount of money due on bonds, notes and accounts, which he afterwards collected. How this differs from any other species of bailment, in principle, it is difficult to perceive, and yet it has never been thought that such cases were within the statute of three years. It may be assumed, that in all cases where the contract is expressed, and the duties of each are defined at the time, that it is not an open account. A contract may be made for the sale of goods, or to build a house, or to perform any other duty, and although it may never be reduced to writing, it will not for that omission become an open account. There is certainly nothing in the statute from which we can arrive at the conclusion that all accounts must be considered as open, which are not stated or reduced to writing. A contract is certainly neither the one or the other, if all its terms are fixed and certain.

Another criterion by which we readily ascertain that this is not an open account, within the terms of the statute is, that it was not so when the deposit was made, and if not so then, it must have become so by the act of the defendant's intestate, in paying over the money at several times. This case is not conceived to differ materially from the case of an attorney to whom a note is confided for collection, with whom it can make no difference whether he pays a portion of the sum collected

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to his principal at different times—according to the argument, by such partial payments, he would change the character of his liability, or rather by his own act, reduce the limit of time which will create a statutory bar from six to three years.

We therefore consider it as clear, from the allegations of the bill, that the statute of three years limitation is no bar; and that if the defendant could bring the complainant's case by evidence, to be one of open account, within the statute, it remained with him to do so by the necessary and proper allegations of facts by his plea or answer, and having omitted to do so, the answer insisting on the statute as a bar, must be referred to the case as stated in the bill, and no other than the six years statute being applicable, he will be allowed the benefit of that alone.

This conclusion renders it necessary to examine the case on the evidence adduced, to ascertain if the demand is barred by lapse of time, and if so, whether any admissions have been made which will withdraw the case from the operation of the statute. These matters are relied on to show a revival of the obligation on the part of the defendant's account with the complainant, which will be severally noticed.

1. It is insisted that the statement of an account before the auditors appointed to examine the accounts in this case, has this effect.

To support this proposition, we must intend what it is certain was never understood by the parties themselves. It would be most unreasonable to suppose that this admission ought to conclude the defendant, and not give it

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the same effect against the plaintiff. But the answer to this position is, that the admission was not made as a *sum due*, or as a *subsisting debt*. It was an admission made for the purpose of facilitating the examination of the accounts, and to relieve the auditors from the trouble of investigating what the parties themselves had previously examined, and were willing to admit as established.

2. The correction which was made of an imperfect judgment, and the payment by Mr. Ormond, in eighteen hundred and thirty, of the amount collected thereon, is next insisted on. This has already been considered under another head, and it may be here remarked, that this payment was never in any manner connected with the representatives of Mason, by any evidence whatever. The money was collected and paid over at the instance of a former representative of the complainant's intestate. If, however, the collection and payment had been made by the present representative of Mason, it could have produced no effect as an admission of the present claim as an existing demand, due and unpaid.

3. The only remaining part to be considered, is whether the case of the complainant is made out by the evidence of Maury, the witness examined, to prove an admission by Mason in his life-time, within six years previous to the institution of the suit.

This witness is admitted to be one of several co-distributors, and an objection to his competency to give evidence, was taken in the court below and overruled. Before he was examined, he executed the following instrument of writing: "I do hereby release to my mother,

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Martha Maury, and my brothers, James P. Maury, William H. Maury and Robinson M. P. Maury, co-distributors of my father's estate, all my right, title and interest, of every character whatsoever, in and to any sum or sums of money, or any thing else that may be recovered by the complainant in the above case." This is signed and sealed by the witness, and appended to his examination. The objection which exists to the admission of this witness, is his interest in the estate of his deceased father, whose administrator is the complainant in this suit.

It does not admit of a question, that this suit is for the benefit of the creditors and distributees of the deceased Maury, and it must be considered for the purpose of testing the interest of a distributee, as if the suit was instituted in the names of those entitled to the fund to be raised or increased by a successful prosecution of the same. The interest which each distributee has in the estate to be divided, is several in its character, and it does not at his death pass to his co-distributees, but he in his turn becomes the foundation of a new stock, who may be persons other than those entitled with him to distribution.

Distributees have not, therefore, a joint right; but the interests are perfectly distinct, each one from the other. This being the case, a release can have no other effect than a transfer of a separate and distinct right, and there can be no difference in law between the assignment of this right to a co-distributee, and an entire stranger. Such a transfer of his interest in the estate does not, in our opinion, remove his disqualification. The case of *Bell vs. Smith*,

(5 Barn. & Cress, 198,) seems to us decisive of the point, when this view is taken. The material facts of that case are as follows: "It was an action of *assumpsit*, brought in the name of Bell, on a policy of insurance. The declaration averred that *Armet*, Gibb, Robertson and Wimble, were, at the time of the loss, interested in the goods insured, to the full amount of the policy, and that it was made for their use and benefit. At the trial, *Armet* was offered as a witness by the plaintiff. He was objected to as incompetent, and the plaintiff gave in evidence a release to him of all actions, claims, &c., which he might have against him by reason of the policy of insurance, or for any monies to be recovered by him of the underwriters. An assignment of all the interest of *Armet*, Gibb, Robinson and Wimble, to Lachlan & Robertson, authorising them to receive the amount to be received on account of the policy, for their own use and benefit, and *Armet* was indemnified against the costs of the suit. The court admitted the witness, but on a writ of error, the Court of King's Bench determined that *Armet* was not a competent witness. Bailey, Justice, after stating that *Armet* was incompetent, because liable to the attorney for the costs of the suit, uses this language: "But I think *Armet* was incompetent on higher grounds. The action was brought at the instance of *Armet*, and three others: it was found they had not sufficient evidence to support it, and machinery was resorted to, calculated to introduce all the evils of champerty and maintenance.

First, *Armet*, without consideration, released all his interest to the nominal plaintiff in the suit, and then in

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consideration of ten shillings, all the parties joined in an assignment to Lachlan & Robinson. It is difficult to put a stronger instance of champerty and maintainance. These are unlawful, because they tend to encourage and keep alive law suits. Now, that was the very object of the assignments in question; for each of the assured may be considered to have admitted by the deed which he has executed, that without Armet's evidence, the action was not maintainable upon these grounds, I think he ought not to have been admitted to give evidence."

The facts of this case bear a striking analogy to the one we are now considering. Armet and Maury occupy the same situation as to interest: both of them are the parties actually interested in the fund, and yet in each case, a nominal plaintiff is interposed. This case unquestionably goes the length of deciding, that an individual, placed by the law in the situation of Maury, cannot be a witness to increase the fund of which he is a distributee. It is not necessary for us to determine this question, as Maury has never in point of fact or law released his interest to any one—as the transfer can have no effect as a release, and as an assignment it is wholly void, for the reasons given in the case of *Goodwin vs. Loyd*, decided at this term.

Admitting it to be effectual as a release, however, there would yet remain in him an interest which is not attempted to be got rid of. The complainant, if successful in this suit, would hold the sum recovered as the assets of the estate of Maury, the intestate, and it would form a fund out of which the debts of the estate would be paid, thus releasing from a burthen, either the lands descended

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(If there be any) to the witness, or relieving the remainder of the personal estate, (in which the witness has not released his interest) from the burthen of the debts due from the estate. Again, if judgment is rendered against the complainant for the costs of this suit, a fund is made chargeable then with it, of which the witness is entitled to distribution.

The case of the complainant, resting solely on the evidence of this witness, as he is shown to have been incompetent when examined, the bill was properly dismissed by the Circuit court, although for a wrong reason—and the judgment is affirmed.

It has been suggested, that in case of an affirmance, the decree should be so modified as to dismiss the bill without prejudice to any subsequent suit, as the witness, Maury, may wish to remove his disability, by profering such a release as will restore his competency. If the case presented a defect in, or an omission to prove a writing, this course would be allowable, as in the case of *Wilkins and Hall vs. Wilkins*, (4 Porter, 245,) and *Gayle vs. Singleton*; but in such a case as this, the modification of a decree for such a purpose cannot be allowed, as the consequences which it might produce would be of mischievous tendency.

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GOODWYN *vs.* LLOYD.

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1. If a witness, whose deposition has been taken on the ground of his being about to leave the State, remain until the trial of the cause,—his deposition cannot be read in evidence.
2. But the failure on the part of a witness, thus situated, to put his determination of leaving the State into execution, until after a term of the court has elapsed, will not deprive the party of the benefit of his testimony, if he leaves the State before the trial of the cause.
3. And his death, within the State, before he executes his determination of leaving it, affords as good ground for using his testimony, as his absence from the State, at the time of the trial.
4. The maxim of the law, that the right to personal property, draws to it the possession, is true only, when the possession by another is consistent with the possession of the owner,—as in the case of a bailment.
5. A chose in action at common law is not assignable; but
6. A transfer of a chose in action for a valuable consideration, vests such an interest in the transferee, as a Court of Equity will enforce, and a court of law protect, if the assignee sue in the name of the assignor.
7. But where the possession of the property assigned, is held by another adversely, and under a color of title, and the owner would be driven to an action to recover his possession—it is a mere chose in action, and the transferee cannot maintain action in his own name.

This was an action of detinue for slaves, brought by the defendant in error. The plaintiff assumed title to the slaves, sued for under a contract of purchase from one Harwood Goodwyn. The proof on the part of the

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defendant in error was, that Robert Goodwyn, the defendant below, had given to his son Harwood two negro girls, which went into Harwood's possession, and so remained for about two years. The slaves were then re-delivered to Robert Goodwyn, and other slaves, the subjects of suit in this action, received by Harwood in exchange. Harwood Goodwyn remained in possession of the last mentioned slaves, for about the space of three years; and whilst sick and absent from home, Robert Goodwyn took them into possession, and had so remained, notwithstanding frequent demands made by Harwood. The slaves were then sold by Harwood Goodwyn to the plaintiff in the action, Lloyd,—and a bill of sale executed, on sufficient consideration.

The defendant offered testimony conducing to show, that the slaves in controversy, had been lent, and not given to his son Harwood.

Upon this state of facts, the court was requested, on the part of the defendant, to instruct the jury,—‘that if the defendant had the adverse possession of the slaves, at the time they were sold by Harwood Goodwyn to the plaintiff,—then the plaintiff was not entitled to a recovery in that suit.’ The court refused this instruction; and charged the jury, that if they believed the sale was absolute and *bona fide*, then the plaintiff was entitled to a recovery;—notwithstanding the defendant might have had wrongful possession of the slaves, at the time of the sale to the plaintiff; and plaintiff may never have had the actual possession.

The plaintiff, as part of his testimony, proposed reading the deposition of a witness, which had been taken

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under the statute authorising the depositions of witnesses, to be taken, who are about to leave the State. The defendant below objected, on the ground, that the witness had remained in the State, after his deposition had been taken, until a term of the court had elapsed. It was in proof that the witness was dead; and that up to the time of his death, he had expressed his determination to leave the State.

The court overruled this objection to the deposition, and suffered it to go to the jury.

On this charge, to which exception was taken, a verdict was rendered for the plaintiff.

Street, for plaintiff in error.

Erwin, contra.

ORMOND, J.—There was no error in the admission of the deposition. The statute authorises it to be taken when the witness is about to leave the State: should he remain until the trial of the cause, it cannot be read. But his failure to put his determination of leaving the State into execution, until after a term of the court had elapsed, would surely not deprive the party of the benefit of his testimony, if he left the State before the trial of the cause. His death within the State, before he executed his determination of leaving it, certainly affords as good grounds for using his testimony, as his absence from the State, at the time of the trial. If not within the letter, it is certainly within the spirit and meaning of the law.

The remaining question is, whether the transaction detailed in the testimony in this cause, was not the sale

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and transfer of a chose in action, and if so, whether the purchaser can maintain an action for the recovery thereof, in his own name.

The general division of personal property, is into things in action and things in possession. A right merely to recover the possession of a chattel by a suit, is a chose in action, as much so, as a bond or promissory note. In the latter case, the instrument is merely evidence of a right to recover a sum of money from another. In the former, the chattel being in the possession of another, if the possession is withheld, the true owner, neither in legal contemplation, nor in common parlance, can be said to have the possession; but having the right of property, he has the right to recover the possession.

It is a maxim of the law, that the right to personal property draws to it the possession; but this is true only when the possession by another, is consistent with the possession of the owner, as in the case of a bailment. But when such possession is held adversely, where the thing is held under a claim of title, and the owner is driven to an action to recover his possession, it is a mere chose in action.

That a chose in action is not at common law assignable, or, in other words, that the right to sue for and recover the possession, cannot be transferred to another, is an ancient doctrine of the common law—(Coke's Litt. 214, A.; 2 Black. Com. 397.)

A transfer of a chose in action for a valuable consideration, will, however, vest such an interest in the transferee, as a court of equity will enforce, and a court of law protect, if the assignee sue in the name of the assignor.

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There can then be no doubt that the transaction disclosed in the testimony, is the transfer of a chose in action, and this is admitted by the defendant's counsel; but he contends that the rule does not apply, when the possessor of the chattel is a mere wrong-doer, which he insists is the predicament of the plaintiff in error. Without determining now, whether cases may not exist, in which the act of a mere trespasser or wrong-doer would operate no change of the possession, we will proceed to enquire what is the attitude of these parties.

The plaintiff below, it is true, proved a gift from the plaintiff in error, to his son, Harwood Goodwyn, in the first instance, and confirmed afterwards, by an exchange for other slaves, on a valuation made by the father himself: that the property thus obtained, remained in the possession of Harwood Goodwyn two years, and was taken out of his possession by the plaintiff in error during his absence from home—that he frequently demanded the possession of the property, which was refused by the plaintiff. The plaintiff offered evidence, conducing to prove, that the original transaction between him and Harwood Goodwyn, was a loan. The slaves remained in the possession of the plaintiff in error about four years, when Harwood sold his right in the slaves to the defendant in error.

It is manifest that the plaintiff in error not only held the slaves adversely to Harwood Goodwyn, but also that he held under color of title, which may account for the extraordinary apathy of Harwood Goodwyn, in suffering the possession of the slaves to remain so long undisturbed. That the possession of the plaintiff was adverse to

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Harwood Goodwyn, is too clear to admit of controversy. The statute of limitations would have commenced running at least from the demand of the slaves, and the refusal to deliver them, if sufficient time had elapsed, and the bar of the statute had been interposed. Such being the position of the parties, it is clear that the right of action could not be transferred by a sale of the slaves. No adjudged case has been cited to show that such an action can be maintained. The absence of all authority is persuasive to show what the law is. Indeed, so seldom has it been attempted to establish the principle, that the industry of the counsel for the plaintiff in error, has enabled him to furnish the court with but two cases, in which the point in question has been ruled.

In the case of Stedman vs. Riddich, (4 Hawke's R. 29,) this point was expressly determined. Chief Justice Taylor says: "But I know of no authority for the position, that a vendee or assignee may sue for property in his own name, which the vendor or assignor, at the time of the sale, could only recover by suit. It seems to me that much of the mischief which the rule designed originally to prevent, would still arise under such a practice, and it is not called for by the necessity of trade or commerce, or any of those causes which introduced the relaxation."

So, also, in the case of Stogdale vs. Fergate, (2 Marshall's Rep. 136,) the Chief Justice, giving the opinion of the court, expresses himself thus: "A chose or thing in action is contra-distinguished from a chose or thing in possession. If it be not in possession, it must be in action, and so *vice versa*. It follows, therefore, if the plaintiff was not in possession of the hogs at the time of the

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sale, that the right of action could not have been thereby transferred to his vendee; and that he was not in possession, is evident." These cases are conclusive on the point involved in this case.

We have been referred by the counsel for the defendant, to an opinion expressed by Judge Story, in the case of the brig Sarah Ann, (2 Sumner's Rep. 206,) in which he is reported to have said: "I know of no principle of law, that establishes that a sale of personal goods is invalid, because they are not in the possession of the rightful owner, but are withheld by a wrong-doer.—The sale is not under such circumstances the sale of a right of action, but is a sale of the thing itself, and good to pass the title against every person not holding the same under a *bona fide* title for a valuable consideration, without notice; and *a fortiori* against a wrong-doer."

Entertaining the profoundest respect for the opinions of that eminent jurist, we feel constrained to dissent from an opinion which appears to be in hostility with well established principles.

Although the reporter has transferred the above remarks of Judge Story into the abstract of principles decided in the cause, it does not appear to us that the point was necessary to be determined in that cause—and that it was merely stated by him as an illustration. The case was on the Admiralty side of the Circuit court of the United States, for the first circuit. One question was, whether the master of a vessel which was stranded, and which he had abandoned to the underwriters, was not only the agent of the owners, but also retroactively the agent of those who might become owners of the ship, if the abandonment was actually and justifiably made.

Although the principle above stated might aid in the solution of that question, and be thus brought in aid of the argument, it was certainly a point not necessary to be determined in the decision of the cause, and therefore not entitled to the weight of an adjudged case. And, again, the judge merely states, that the effect of a sale under the circumstances supposed, would be to vest the title in the purchaser; how the right thus acquired could be enforced, is not stated, nor whether it could be enforced by the transferee in a court of law, which is the sole question before this court.

It is also urged, that the rule had its origin in a state of society different from ours—that the reason of its adoption has long ceased to exist—and that this court must adapt the law to the exigencies and wants of society. We cannot think so. Many of the reasons which influenced its adoption, must always exist in any mode of society, so long as wealth gives influence, and power is superior to weakness.

In England, as well as in this country, the rule has indeed been relaxed, as the wants of society, in its progress, demanded. And the relaxation, so far from weakening, has imparted vigor to it, by restraining it within its legitimate bounds. The rule is the foundation of the law against champerty and maintenance, which, by the decision of the court in the case of *Holloway vs. Lowe*, (7 Porter, 486,) has been considered law in this country.

Even if in our opinion, the law was of questionable propriety, we should hesitate long, before we would undertake the abrogation of a principle, coeval with the very foundations of the common law.

Bickerstaff vs. Patterson.

Let the judgment be reversed, and the cause remanded, to enable the plaintiff, if he can, to establish another title.

BICKERSTAFF VS. PATTERSON.

1. Notice to defendant, or advertisement, is not necessary in a case of attachment against an absent defendant, where the judgment is not rendered until after the expiration of six months from the issuance of the attachment.
2. Where the sheriff returns, to a writ of attachment, that he has levied on certain property—it will be intended that the property levied on was that of defendant in attachment.

Error to the Circuit court of Mobile.

Attachment against an absent debtor, tried before *Pickens, J.*

In this case, the sheriff returned that he had levied the attachment on sundry articles, without adding that the articles levied on were the property of defendant: judgment was rendered against defendant, and the property levied on, condemned to satisfy the judgment.

The plaintiff in error assigned:

That the suit commenced by an attachment. There was no levy upon any property of the defendant in attachment, nor did he ever have any notice by advertisement, or otherwise: nor did he ever appear to the action.

Thornton, for plaintiff in error.

COLLIER, C. J.—The reversal of the judgment of the Circuit court, is sought on these grounds:

First—That it does not appear the plaintiff had notice of the pendency of the attachment previous to judgment—or that the same was advertised.

Second—The sheriff's return of the levy of the attachment does not state that the property seized was the plaintiff's in error.

The first point was decided adversely to the plaintiff in *Murray vs. Cone & Park, use, &c.* (at this term.)

The second ground, we think, cannot be sustained. The sheriff is an officer placed under great responsibility by the law, which defines his duties. He pledges to the public, under the solemnity of an oath, his integrity and diligence; and consequently, every reasonable intendment must be made in favor of the regularity of his official acts. When he receives process, requiring him to levy upon the property of a particular individual, and he returns it according to its mandate, with his endorsement, stating that he had levied the same on property, (particularly describing it,) we must intend that the property seized belonged to the defendant; because the process only authorised a levy upon his effects.

In the present case, the sheriff acknowledges the receipt of the attachment, and returns it, with his levy endorsed on sundry articles of furniture. These we must intend to have belonged to the plaintiff in error—they were sufficient to give the Circuit court jurisdiction. Its judgment is consequently affirmed.

Quigley adm'r, vs. Primrose.

QUIGLEY, adm'r, vs. PRIMROSE.

1. The statute of this State does not destroy the distinction which the law merchant recognizes, between foreign and inland bills of exchange, and promissory notes; nor does it make the same rules applicable to their securities.
2. The terms of the statute are, that the law merchant, applicable to each several class shall prevail, instead of the provisions previously in force in this State, with relation to assignable securities.
3. No protest is necessary to fix the liability of the endorser of a promissory note—a demand of payment at the time and place provided for it, with notice of such demand to the endorser, is all that the law requires.
4. A plaintiff is not held, in an action against an endorser, to strict proof of the time or place of demand of payment of a promissory note, when laid under a *scilicet*, and, in most cases, may make his proof conform to the legal effect of his declaration.

Error to the Circuit court of Mobile.

Assumpsit on a promissory note, payable in bank, tried before *Pickens, J.*

In this case, judgment for plaintiff was rendered by *nisi dicit*.

The plaintiff in error assigned as error:

That the declaration did not contain a sufficient cause of action, whereon to recover of the plaintiff in error, being sued on the endorsement of her intestate, of a note negotiable in the Bank of Mobile; and that it did not contain a proper and legal averment of demand made of the maker, and of protest and notice thereof to the endorser.

Quigley, adm'x, vs. Primrose.

Thornton, for plaintiff in error.

Dunn, contra.

GOLDTHWAITE, J.—The plaintiff in error insists—

1. That her intestate is not liable, as endorser, unless a protest of the note is averred in the declaration, and shewn in evidence; and

2. That the averment of the time when this note was presented for payment, shews no demand of the maker at the place provided for payment, at the time when it became due; and therefore, no cause of action is shewn.

1. It is supposed by the counsel for the plaintiff in error, that our statute places promissory notes payable in bank, on the same footing as foreign bills of exchange, and that they are to be governed by the same rules; but this supposition is not warranted by the act, which is as follows: "Hereafter, the remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the rules of the law merchant, as to days of grace, protest and notice."

It was not intended by this act, to destroy any distinction which the law merchant recognizes, between foreign and inland bills, and promissory notes; nor to make the *same rules* applicable to each of their securities; but the intention of the statute, as indicated by its terms, is, that the law merchant, as applicable to each class, shall prevail, instead of the provisions previously in force in this State, with relation to most assignable securities. No protest was necessary by the law merchant, to fix the liability of the endorsers of promissory notes—a demand of payment at the time and place pro-

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vided for it, with notice of such demand, was all that the law required, or now requires; and if such a demand is shewn by the declaration, this objection cannot prevail.

2. But it is said that no such demand is shewn. The averment of the declaration is in these words: "The said plaintiff avers, that afterwards, *to wit*, on the 28th day of March, when said note became due and payable, according to the tenor and effect thereof, the same was duly presented," &c. By the rules of the law merchant, this note became due on the 26th March, allowing three days grace, and if in point of fact, presented on the day stated in the declaration, the endorser would have been discharged. But the plaintiff is not held to strict proof of time or place, when laid under a *scilicet*; and he is authorised, in most cases, to make his proof conform to the legal effect of the declaration. Here the material matter to be averred was, that the note, *when due*, was presented; and the allegation that it was on the twenty-eighth of March, being wholly inconsistent with this allegation, may be rejected. The authorities are all concurrent to prove that this objection cannot avail the party.—(Chitty on Bills, 851; Bynner vs. Russel, 1 Bing. 23.)

Let the judgment be affirmed.

MURRAY VS. CONE et al.

1. In debt on foreign judgment, plaintiff is entitled to damages, to the extent of the interest allowed, at the place where the judgment was obtained.
2. But in such a case, in the absence of a plea, the case ought to be submitted to a jury, on an enquiry of damages, and the statute of the place of the contract, which ascertains the value of money, ought to be produced, or the usage proved.
3. Where judgment is not rendered in attachment against an absent defendant, until after the expiration of six months from the issuance of the attachment, it is no ground of error, that notice was not given to the absent defendant of the issuance of the attachment, or the pendency of the suit either by mail or publication.
4. The affidavit of one who describes himself as agent of the plaintiff in attachment, is a sufficient compliance with the statute, to warrant the issuance of an attachment.

Error to the Circuit court of Russell county.

Debt, in attachment on foreign judgment.

This was an action of debt on a judgment obtained against defendant in Georgia. There was no appearance, and judgment was rendered against him for a larger amount than was claimed in the declaration. To reverse the judgment so obtained, a writ of error was sued out.

The errors assigned are stated in the opinion of the court.

COLLIER, C. J.—It is insisted that the judgment, in this case, should be reversed, for these reasons :

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1. The judgment is by default, and for a larger sum than is demanded by the declaration.

2. No notice was given to the plaintiff in error of the issuance of the attachment, or pendency of the suit.

3. The affidavit on which the attachment was sued out, was not made either by the defendants, or their agent or attorney.

1. The declaration discloses as the cause of action, a judgment recovered by the defendants in the Superior court of the county of Hall, in the State of Georgia, for the sum of two thousand one hundred and sixty-three dollars, and eighty-five cents. Though the action is (as it should be) debt, yet a judgment final is rendered by default, for the sum of twenty-five hundred and nine 61-100 dollars, in damages.

We imagine that the judgment was swelled to an amount beyond the debt claimed, by the addition of interest thereon. That the defendants are entitled to damages beyond the recovery in Georgia, to the extent of the interest allowed there, is indisputable; but to show what that is, they should have submitted the case to a jury, in the absence of a plea, on an inquiry of damages; when they might have produced the statute, or if there was none, proved the usage of Georgia, which ascertains the value of money there. The neglect to pursue this course makes the judgment erroneous—(Peacock *vs.* Banks, Ala. Rep. 387; Evans *vs.* Irvin & Dunlap, 1 Porter's R. 390; Evans *vs.* Clark, *ibid.* 388; Richardson *vs.* Williams, 2 Porter's R. 239.)

2. In respect to the second objection, it may be remarked, that the attachment law was new-modelled in

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eighteen hundred and thirty-three. The acts previously existing were to some extent omitted, and new provisions added, and even the old law, so far as retained, was greatly varied in its terms. It is not now necessary to give notice, either through the medium of the post office, or by public advertisement, to a non-resident defendant. The plaintiff in attachment may, if he know where the defendant resides, transmit him a notice by mail, or when his residence is unknown, he may apply to the judge or justice issuing the attachment, who will prescribe the manner of the advertisement. If, however, all this is delayed, the only consequence is, that the plaintiff can take no judgment within six months—(Aik. Dig. s. 15, p. 41.) Had the law have remained unchanged, we should have followed the decision of this court in *Harris & Farrow vs. Clap*, (Ala. Rep. 328.) The record shows that the judgment was not rendered until more than six months after the issuance of the attachment. The objection, then, is not well taken.

3. Upon looking into the record, we think this reason is not sustained. The individual making the affidavit describes himself as the agent of the persons for whose use the suit was brought. Though not nominally so, they are for most purposes the plaintiffs—they complain; they are responsible for costs; and to them belongs whatever may be recovered. The affidavit, then, in this respect, meets the requisition of the statute. But, for the first cause considered, the judgment must be reversed, and the case remanded.

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• GAZZAM vs. KIRBY.

1. In general, if there be a special parol agreement for the performance of any duty, no action will lie, until the duty has been actually performed.
2. And if the contract has been executed, the agreement to pay the money becomes absolute, and a recovery may be had upon the appropriate count for an *indebitatus assumpsit*.
3. If a party undertake to do work by a fixed time, or in a particular manner, but fails to perform it within the time, or according to the manner agreed; he cannot recover on the special contract.
4. But if the work done was of value to the defendant, plaintiff may recover on a *quantum meruit*.
5. If the work be so illly executed, as to be of no benefit to the defendant, the plaintiff is not entitled to recover any thing; not even for materials furnished.
6. If the work performed is of less value to a defendant, when completed, after a stipulated time, than it would have been, had the contract been performed with punctuality,—it is competent for him to reduce the recovery by shewing that fact.
7. And, in such a case, the contract is good evidence to shew what estimate the parties originally placed on the work.

Error to the Circuit court of Mobile.

Indebitatus assumpsit for work and labor, tried before Pickens, J.

On the trial of the cause, the plaintiff offered in evidence, a written contract, executed by the parties, a copy of which is appended; to the reading of which, under the declaration, the defendant objected, but was over-

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ruled, and the contract read to the jury. The plaintiff then introduced evidence, conducing to shew, that the work had been done substantially, as required by the contract, excepting as to time. The defendant introduced evidence tending to shew, it had not been so done. Evidence was given also, shewing that while the work was in progress, the defendant had conveyed the property to some one else; and that such purchaser, after the work was finished, had used it. The work was not completed, until a few weeks after the time mentioned in the contract, but there was no evidence that any injury had resulted to defendant from that circumstance.

The court charged the jury, that if they were satisfied from the evidence, that the work was done substantially, as required by the terms of the contract, they were authorised to find for the plaintiff the amount specified in the contract, although the work might not have been completed, for a few weeks subsequent to the time stated in the contract—to which exception was taken.

The contract was as follows :

“Memorandum of an agreement made and concluded between A. H. Gazzam, of the one part, and Martin Kirby, of the other part, witnesseth: That the said Kirby agrees to fill up with sand and earth, a strip of ground adjoining land claimed by Gordon in the Favre Tract, beginning at a ditch, and extending south eighty feet, and to commence at a hillock or margin thrown up by the water, and extending out to the eastern limits of Water street, to be filled up above high tide. The costs of the plank for curbing along the sides, to be paid by said Gazzam, and when the said lot shall be so filled up,

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said Gazzam shall pay the said Kirby twelve hundred dollars, and said Kirby binds himself, to have the work finished, in one month from this time, or sooner, if he can. Dated in Mobile, 17th March, 1836.

(Signed,)

"A. H. GAZZAM,

"MARTIN KIRBY."

Verdict and judgment for plaintiff, to reverse which, a writ of error was sued out.

The plaintiff in error, assigned :

1. That the court erred in permitting the written contract to be read to the jury.
2. The court erred in charging, that the plaintiff could recover the amount specified in the contract, though the work was not completed within the time prescribed by it.

Thornton, for plaintiff in error.

Campbell, contra.

Campbell, for the defendant in error, to support the judgment below, cited 4 B. & P. 355; Buller's N. P. 139; Doug. 651; 7 John. 132; 4 Cowen, 564; 10 John. 36; 5 Mass. 391.

COLLIER, C. J.—The material inquiry in this case is, if one person agrees to perform certain work and labor for another, within a specified time, and that other undertakes to pay an agreed sum of money on its performance, and the work is done, though not within the stipulated time, will an action lie to recover so much as the person performing it deserved to have for his labor?

In general, if there be a special parol agreement, for the performance of any duty, no action will lie until the duty has been actually performed; yet, if the contract has been executed, the agreement to pay money becomes absolute, and a recovery may be had upon the appropriate count, for an *indebitatus assumpsit*. So, if a party undertake to do work by a fixed time, or in a particular manner, but fails to perform it within the time, or according to the manner agreed, he cannot recover upon the special contract; because, to entitle himself to its enforcement, he must allege and prove a performance according to its terms. But he is not remediless. If the work he has done was of value to the defendant, he may recover on the *quantum meruit*. If the work, however, is so illy executed, as to be of no benefit to the defendant the plaintiff is not entitled to recover any thing—not even for materials furnished. And if work is of less value to a defendant, when completed after a stipulated time, than it would have been, had the contract been performed with punctuality, it is competent for him to reduce the recovery, by showing that fact. As, if the price of labor had fallen between the time when the work should have been and was performed, or if it enhanced to a less extent the value of the property on account of the delay—or if the price originally agreed, was too much. We merely mention these, as instances, without pretending to say what precise limitations should be placed upon such a defence,—that there might be cases of injury to a defendant, so remote as not to allow of their being considered in diminution of damages, we think more than probable—(3 Starkie's Ev. 1768, 1769, 4 Wend. R. 290.)

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In this case, the bill of exceptions informs us that the work was executed within a short time after the expiration of the period agreed on, and we must infer without any objection from the plaintiff in error, as none is shown. Moral justice, as well as law, then, declare that the plaintiff should make compensation. Though the contract was out of view, unless to show what estimate the parties originally placed on the work, there was no objection to its admission for that purpose. It was conclusive to show the *maximum* of the damages the jury could render, and served to prove the value which the plaintiff himself once placed on the work; yet the defendant may have given other evidence to this point. At any rate, it was not conclusive upon the plaintiff, and he might have lessened the verdict, by the introduction of any legal proof—(2 Starkie's Ev. 97, and cases cited in notes.)

But it is objected, that the jury, in their inquiries, were restricted by the charge of the court, and were informed that the measure of damages should be the price agreed to be paid by the contract of the plaintiff.

The instructions of the judge to the jury, we think, do not authorise such an interpretation. They are explicitly informed, that "they were authorised to find the amount specified in the contract;" if the work was performed substantially, as it contemplated, except as to time. He does not say to them, that that *must* be the measure of their finding—only that it *may*. In this, as we have shown, there is no error. If no evidence was given, as we may well suppose, from the silence of the bill of exceptions, to diminish the damages, the criterion

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fixed by the contract, seems to us to have been the only guide for the jury to follow.

We are of opinion that the judgment of the Circuit court must be affirmed.

WHITMAN & HUBBARD *VS.* THE FARMERS BANK OF CHATTA-
HOOCHEE.

1. No authority is given by statute to a notary public, to certify a fact in regard to a bill of exchange, independent of the protest.
2. If written evidence be by the court improperly suffered to go to the jury, to prove a fact indispensable to support the action, and competent evidence conclusively proving the same fact, be afterwards offered and received—the error of admitting the improper evidence is not cured. And, in such case, the error of allowing the improper written evidence, can only be cured, by withdrawing from the jury the written evidence offered, as it cannot be known which of the two modes of proving the fact, was relied on to support the action.
3. Each party to a bill of exchange or promissory note, whether by endorsement or mere delivery, has, in all cases, until the day after he has received notice, to give or forward notice to his prior endorser, and so on till the notice reaches the drawer.

Error to the Circuit court of Montgomery.

Assumpsit on a bill of exchange, tried by *Crenshaw*, J.

At the trial of this cause, the plaintiffs to the action gave in evidence the bill of exchange described in the declaration, and a protest for its non-payment on the day it became due, in which the notary had certified that he deposited in the post office at Mobile on the same day,

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notices of the protest for the drawers and endorsers, under cover, addressed to D. Hudson, Esq., Assistant Cashier, Columbus, Georgia. They then offered in evidence a certificate, which was in the following terms: "Columbus, Geo. I do hereby certify, that on the 17th day of May, 1837, I deposited in the post office in this place, notices addressed to the following persons, at Montgomery, Ala., viz: to Walsh & Fitzpatrick, Wm. T. Brame, T. W. Brame, Whitman & Hubbard—advising them of the non-payment of a draft drawn by Whitman & Hubbard, on Edward Hanrick, for \$10,000. And that on the 20th May, 1837, I deposited in the post office, notices addressed to the following persons, at Montgomery, Ala., viz: to Robert Harwell, Wm. T. Brame, Thomas W. Brame, and Whitman & Hubbard, advising them of the non-payment of a draft drawn by Whitman & Hubbard, on Edward Hanrick, for \$10,000. D. HUDSON, Cash.

I affirm and attest the truth of the above certificate.

D. HUDSON, Notary Public."

Which letter was under his notarial seal. This evidence was objected to by the defendants to the action, but admitted by the court. It was subsequently proved, that the defendants had admitted (after the bill was due and protested) that they owed the amount, and that they had promised to pay it.

On this evidence, the defendants moved the court to instruct the jury, that to charge them, notice of the non-payment should have been sent to the place of their residence, or the post office nearest to them; which charge was refused; and the jury was instructed, that if they believed from the evidence, that the residence of the

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drawers was unknown, and that the notices were sent to the agent of the plaintiffs, at Columbus, Georgia, and by him to the place of their residence, such notice was recoverable.

The errors assigned were two fold :

1. As to the admission of the evidence objected to;
2. As to the charge given, and refused to be given, by the court.

Goldthwaite, for the plaintiffs in error, contended, that it was not the duty of the notary to give the notice objected to below, and could not therefore be proved by his seal—(*Morgan vs. Van Ingen*, 2 John. 204.)

Porter, for defendant in error, thought that proof of the admission by defendants below of their liability, and their promise to pay the amount of the bill, sufficient to sustain the judgment, and that the court would intend, that the verdict was found on the competent evidence. The incompetent evidence might have been rejected below, and yet there was sufficient testimony to sustain the case of the plaintiffs. Concerning notice of non-payment of the bill, and protest, he cited Aik. Dig. 327; *McGrew vs. Toulmin*, 2 Stew. & Por. 428; *Worsham vs. Goar*, 4 Porter, 441.

GOLDTHWAITE, J.—By the rules of the common law, the fact of notice, when requisite to charge the drawer or endorser of an inland bill of exchange, was necessary to be proved by witnesses in the same way as any other fact given in evidence, and could not be established by

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the certificate of a notary. The act of eighteen hundred and twenty-eight, section one, (Aik. Dig. 327,) enacts, that "the protest of a notary public, which shall set forth a demand, refusal, non-acceptance or non-payment of any inland bill of exchange, or other protestable security, for money or other thing, and that legal notice, expressing in the said protest, the time when given of such fact or facts, was personally or through the post office, given to any of the parties entitled by law to notice, shall be evidence of the fact or facts it purports to contain, and entitle the holder of such security to the damages to which, by law, he may be entitled." It is clear, that no authority is given by this act to any notary, to certify a fact independent of the protest. In the present case, the protest was legal evidence, that notices were placed in the post office at Mobile, and sent under cover, to D. Hudson, at Columbus—but it was not competent for him, or any other notary, to make evidence by giving a certificate as to the manner in which he subsequently forwarded those notices to the defendants, or sent others to them to fix their liability. It was erroneous, therefore, in the Circuit court, to admit this certificate, and the subsequent proof of an admission of liability and promise to pay the amount of the bill, did not cure the error, for we are not informed whether the one or the other mode of proving the liability of the defendants, was relied on in the court below. If the effect of this objection was to be avoided, after the admission of the evidence, it could only be by withdrawing from the jury, the certificate objected to.

2. The charge which was requested, seems to have

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been this: That it was necessary, in order to fix the liability of the defendants, that notice should have been forwarded to them from Mobile, when the bill was protested. Such, however, is not the law. It was only incumbent on the holder of the bill in Mobile, to give notice to those to whom they looked for payment, and each party, on receiving notice, is allowed one day to give notice to those liable to him. The general rule is given with much distinctness and precision by Chitty, in his *Treatise on Bills*, page 520. It may be quoted thus: "It is usual for the holder only to give notice to the person from whom he immediately received the bill or note, especially if he is ignorant of the residence of the other parties; and if so, his neglect to give notice to the other prior endorsers, and to the drawer, cannot, on any sound principle, deprive either of the endorsers of the right to proceed against the person who endorsed to him, and all prior parties, provided he in his turn has duly forwarded notice. The rule is, therefore, clearly settled, that *each party to a bill or note, whether by endorsement or mere delivery, has, in all cases, until the day after he has received notice, to give or forward notice to his prior endorser, and so on till the notice has reached the drawer.*"

The rule thus laid down by Chitty, was substantially the one given in charge to the jury, as they were instructed that it was not necessary that notice should be sent from Mobile, if the holders there of the bill were ignorant of the residence of the drawers or endorsers, but that if sent to the agent of the plaintiffs at Columbus, and by him to the defendants, it was sufficient in law to charge them. In this charge there was no error, and if

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the defendants below had wished one more specific and definite, it was their duty to have asked it.

For the error in admitting the evidence objected to, the judgment is reversed, and the cause remanded.

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1. A promise in writing to accept a bill of exchange not in *esse*, is, in law, a sufficient acceptance, if the bill be taken on the faith of such promise.
2. A collateral, *written*, or a mere verbal promise to accept a bill, made after it is drawn, may also amount to an acceptance.
3. But a mere verbal promise to accept a bill of exchange, not yet drawn, is not such an acceptance, as will in law bind the acceptor, even if made to the person in whose favor the bill is drawn.
4. The non-suits, (two of which equal a verdict,) embraced in the statute of eighteen hundred and seven, (Aik. Dig. 283, s. 135,) must be such as continue to the end of the term.
5. Thus,—two non-suits, taken in a cause, at different terms, each of which is set aside before the end of the term, are not equal to a verdict.

Error to the County court of Mobile.

Assumpsit on a bill of exchange. The cause of action, in this case, was a bill of exchange, orally accepted by defendant. Also, for damages sustained by plaintiffs, by reason of a breach of contract by defendant, in refusing to accept a draft, after having promised and undertaken to accept the same.

The record showed, that at February term, eighteen hundred and thirty-six, a non-suit was taken, after a jury sworn, and a new trial granted.

At the February term, eighteen hundred and thirty-seven, after a jury came, &c. a non-suit was again taken, which was set aside.

On the trial, plaintiffs proved, that defendant, sometime between the first of January and fifteenth of March, eighteen hundred and thirty-four, agreed to accept a bill, to be drawn on him by one Carpenter, who was credited by Geddes, on condition of the acceptance by defendant of his bill. Plaintiffs asked defendant to state distinctly, whether he would accept, for goods to be sold to Carpenter, to which defendant answered, that he would so accept. A draft was drawn on defendant, by Carpenter, in favor of plaintiffs, for goods sold to Carpenter, after said agreement, and in pursuance of it. The date of the bill was the fifteenth of March, eighteen hundred and thirty-four, in pursuance of the agreement aforesaid, and the amount, including interest, was four hundred and forty-nine dollars, and sixty cents, payable four months after date. The bill was presented by witness to defendant for acceptance, and defendant desired witness to leave the bill, and call in a day or two: when witness called, defendant declined accepting the bill. The bill was presented within one week after it was drawn. Defendant also subsequently in a conversation with witness, admitted he was bound for the bill, but said he would never accept or pay it.

Plaintiffs also proved that they had served on defendants counsel, a notice to produce the bill on the trial.

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Defendant offered no evidence, but requested the court on this evidence, to instruct the jury, that the plaintiffs could not recover in this action, without producing to the jury the bill declared on, which the court declined. Defendant further requested the court to instruct the jury, that the evidence produced, was not sufficient to maintain the action, as declared on by plaintiffs, but the court declined so to instruct, and instructed the jury, that if they believed, the bill was made and drawn on the agreement mentioned by the witness, and that defendant had agreed to accept such a bill, although before it was drawn, and if the bill was within the terms of the agreement, and they believed it to be in the possession of the defendant, that although not produced, notice having been given to the defendant to produce it, and although not accepted—still defendant might recover in this action. To which refusals to charge, and charges given, defendant excepted.

Plaintiff in error assigned:

1. The court erred in overruling the motion to enter judgment for the defendant below, because of two nonsuits having been suffered by plaintiff below.
2. There did not appear to have been any declaration filed by the plaintiff below.
3. The court erred in refusing to charge that the plaintiff below could not recover, without the production of the bill of exchange.
4. The court erred in refusing to charge as required by the defendant below, that the evidence produced by the plaintiff below, was not sufficient to maintain the action.

5. The court erred in the charge which it gave to the jury.

Thornton, for plaintiff in error.

Dunn, contra.

ORMOND, J.—The view we take of this case, renders it unnecessary to consider but two of the points raised in the cause.

There was no error in the refusal of the court to enter judgment for the defendant in the court below, on the ground, that the plaintiff below had suffered two non-suits. The non-suit spoken of in the statute, is one which continues to the end of the term, as is manifest not only from the statute, but from the reason of the thing.

“No more than two new trials shall be granted in the same cause; and two non-suits shall be considered equal to a verdict against the party suffering the same.” Thus, we see that a non-suit is put in juxtaposition to a verdict, and the evil intended to be remedied, was the vexation of numberless suits for the same cause of action.

The remaining question is, whether in law there was an acceptance of the bill of exchange, which is here attempted to be enforced. The evidence is, that the plaintiff had previously accepted and paid two bills of exchange, drawn by one Carpenter, in favor of the defendants in error, for provisions furnished Carpenter. That before the bill in question was drawn, the defendants enquired of the plaintiff whether he would accept any further for goods to be sold to Carpenter; that defendant

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said he would accept. The goods were accordingly furnished to Carpenter, and the bill drawn: when it was presented for acceptance, the plaintiff in error retained the bill—said he would call on the defendants in a day or two, but declined accepting at that time.

Whether a verbal promise to accept a bill not in *esse*, will, in law, amount to an acceptance, is now, for the first time, presented to this court; and, in a country so highly commercial as ours, is a question of the utmost importance.

In the case of *Pillans vs. Van Mierop*, (3 Burrows' Rep. 1663,) it was for the first time held, that a promise by the defendant, in writing, to accept such a bill as the plaintiff should in about a month's time draw upon the credit of a third person, amounted to an acceptance of the bill. This decision was afterwards qualified by Lord Mansfield, in the cases of *Pierson vs. Dunlop*, (Cowper, 573,) and *Mason vs. Hunt*, (Douglass' Rep. 296,) by making the right of recovery to depend on the fact, whether the bill was taken on the faith of the promise to accept. To the same effect are the cases of *Clarke vs. Cock*, (4 East, 60,) and *Wynne vs. Raikes*, (5 East, 514,) but even with this exception, Lord Kenyon, in the case of *Johnson vs. Collings*, (1 East, 98,) considered that it was carrying the doctrine of implied acceptances to the utmost verge of the law.

In the United States, the doctrine on this interesting subject, appears to stand on the same footing with the latter English decisions. In *Coolidge vs. Payson*, (2 Wheat. 67,) Chief Justice Marshall thus states the law: *6*
"Upon a view of the cases which are reported, this court

is of the opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter a virtual acceptance, binding the person who makes the promise."

So, in the case of *McEvers vs. Mason, Hodgson & Co.*, (10 Johns. R. 207,) it was held, that a promise in writing to accept a bill of exchange, will not, in law, amount to an acceptance, unless the bill was taken on the faith of such promise—(See also *Goodrich & De Forest vs. Gordon*, 15 Johns. Rep. 6; *Schimmelpennich vs. Bayard*, 1 Peters' R. 283; *Mayhew vs. Prince*, 11 Mass. R. 54; *Barngee vs. Hovey*, 15 Mass. R. 11; *Parker vs. Greele*, 2 Wendell's R. 545.)

It appears very clearly from the cases cited, that it is now well settled, both in England and the United States, that a promise in writing to accept a bill of exchange not in *esse*, will be in law an acceptance, if the bill be taken on the faith of such promise. It seems equally certain, that a collateral, written, or a mere verbal promise to accept a bill, made after the bill is drawn, may amount to an acceptance. But will a mere verbal promise to accept a bill not yet drawn, be an acceptance of the bill after it is drawn, even if, as in this case, it is made to the person in whose favor the bill is to be drawn?

Waiving, for the present, the consideration of the question, that, in this case, there was no promise to accept for any precise sum, and also waiving the influence which the statute of frauds might exert over it, as being

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a promise, not in writing, to "answer for the debt, default or miscarriage of another person," we know of no case in which it has been determined that a promise to accept, under such circumstances as the present, has been held to be an acceptance of the bill when drawn.

It is perhaps to be regretted, that any acceptance, other than one written on the bill, should ever have been received as valid; at all events, we do not feel authorised to go beyond the clear and precise rule laid down by Chief Justice Marshall, before cited from 2 Wheaton.

In this case, not only was the promise not in writing, but it was uncertain for what amount the bill was to be drawn, when it was to be drawn, and when payable; the court, therefore, erred in not rejecting the evidence.

As the cause must be remanded, no notice is necessary to be taken of the assignment that there is no declaration, as the defect can be supplied before another trial.

Let the judgment be reversed, and the cause remanded.

SINGLETON VS. GAYLE.

1. The representative of one who, at an administrator's sale, purchased for an inadequate price, slaves assumed to be subject to a mortgage which had lost its lien, is a necessary party to a bill filed by the mortgagee seeking to foreclose the mortgage, to protect the interest of creditors; and without making such representative a party, no decree can be had in the cause.
2. An executor who has one of the slaves in possession, should also be made a party to the bill.
3. Where a complainant neglects or refuses to make the necessary parties defendants to his bill, after objection made—the court will be authorised to dismiss the bill without prejudice.
4. A bill to foreclose a mortgage, where the record contains no proof of the execution of the bond and mortgage, will be dismissed.
5. A record in chancery must shew affirmatively all the evidence necessary to sustain it.
6. Where the language of the master's report is such as to warrant the belief that the bond and mortgage had been produced before him and proved, it will be sufficient: but where the report does not warrant such a belief—the production and proof before him of the bond and mortgage will not be presumed.
7. The report of a master before a decree of reversal, and on which report the decree is in some measure founded, cannot be afterwards considered.
8. The statute making an instrument of writing evidence of the debt or duty for which it was given, does not apply to suits in chancery.
9. Before a decree is pronounced, on a bill taken *pro confesso*, the court must be satisfied by sufficient evidence, of the justice of complainant's demand—(Aik. Dig. 288.)

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10. The answer of one defendant in chancery, cannot be read as evidence to charge a co-defendant.
11. Notice of the existence of a lien, admitted by one who purchased at an administrator's sale under the lien, cannot bind those who claim under the purchaser.
12. Nor does such notice admitted, supercede the necessity of proving the lien, when it is attempted to be enforced.
13. A decree cannot be rendered against defendants, as executors *de son tort*, who are not sued in that character.
14. Where one is charged as administrator of an estate, a decree cannot be rendered against him as a purchaser, with notice of a lien in favor of a complainant, seeking to enforce the lien.
15. No decree can be had against a purchaser without notice of a lien, unless his vendor, who was a purchaser with notice, be made a party.

Error to the Circuit court of Monroe, exercising chancery jurisdiction.

Bill of foreclosure, tried before *Lipscomb, J.*

This case was before the Supreme court, at July term, eighteen hundred and twenty-eight—(See 1 Stewart, 566, where the case is reported at length.) It was remanded with a view, among other things, of enabling the complainant to make additional parties defendants. This duty, it appears, was neglected by complainant, and a decree rendered against him below—to review which decree, the case was again brought up to this court.

Hopkins, for the plaintiff in error.

Gayle, contra.

ORMOND, J.—The view which we take of this case,

renders it unnecessary to consider most of the points which have been raised in the very elaborate investigation which the case has received.

The cause has been pending in our courts fourteen years. It was before this court in the year eighteen hundred and twenty-eight, when a decree was made reversing the decree which had been rendered in the Circuit court, and remanding the cause for further proceedings—(1 Stewart, 566.) The cause was again heard in the Circuit court, and the bill dismissed, from which a writ of error is prosecuted to this court.

The bill is filed to foreclose a mortgage on a number of negroes, which it is alleged had been executed by Matthew Gayle, to the plaintiff. After the death of Matthew Gayle, the negroes so mortgaged were sold, subject to the mortgage of the plaintiff, and purchased by Mary Gayle, widow of Matthew Gayle, deceased. Before the finding of the bill, Mary Gayle had also departed this life. It is our opinion, that her representative is a necessary party in this cause, to protect the interest of creditors, and that without making such party, no decree can be had in the cause—(4 Porter's Rep. 245.) The executor of Billups Gayle, should also have been made a party, as the record discloses that one of the negroes purchased by Mary Gayle is in his possession, as the executor of Billups Gayle.

It is true, as a general rule, that a bill will not be dismissed for want of proper parties; but as no final decree can be made in the cause until the parties are all before the court,—if after the objection is made for want of proper parties, the complainant neglects or refuses to make

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the necessary parties, the court will be authorised to dismiss the bill, though in such cases it would be proper to dismiss without prejudice. In this case, this objection was taken when this cause was here in eighteen hundred and twenty-eight. The court then held, that the bill should not have been dismissed for that defect, but that the bill should have been amended. No steps have since been taken to remedy this defect by the complainant. He must, therefore, abide the effect of his supine negligence.

The decree of dismissal is sustained on another ground: there is no proof whatever in the record, of the execution of the bond and mortgage. Indeed, it does not appear that either the bond or mortgage have ever been produced in the cause. The bill contains, as exhibits, two instruments, which are alleged to be copies of the originals, and it is stated that the originals will be produced on the trial.

It is, however, supposed by the complainant's counsel, that the bond and mortgage are proved by the report of the master, which is in these words: "Additional report, made 8th March, 1828—Richard Singleton, by virtue of the claims contended for in the bill filed in this cause.

"Principal,

\$1100

"Interest to 8th March, at 7 per cent,

1276 91

As the record in a chancery cause must show affirmatively all the evidence necessary to sustain it, it follows that this cannot be received as proof of the execution of the bond and mortgage: it does not profess to be any thing more than a mere calculation of the amount due at the time of making the report, and cannot be received as

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proof of the deeds. This point was expressly ruled by this court, in Wilkins & Hall vs. Wilkins, (4 Porter's R. 246.)

If the language of the master had been such as to warrant the belief, that the bond and mortgage had been produced before him and proved, it would be sufficient; but we do not understand from his report, that he intended any thing more than a mere calculation of interest.

But this report, such as it is, was made before the reversal of the cause in this court in eighteen hundred and twenty-eight, which reversal was founded in part on this report of the master. It cannot, therefore, be now considered for any purpose.

It is maintained by the counsel for the plaintiff in error, that the statute making any instrument of writing, whether under seal or not, evidence of the debt or duty for which it was given, unless its execution is denied on oath,—applies to this case, and dispensed with the necessity of further proof.

We are of opinion, that the act does not apply to suits in chancery. The law regulating proceedings in chancery, (Aik. Dig. 288,) declares that "before a decree is pronounced on a bill taken *pro confesso*, the court shall be satisfied by sufficient evidence of the justice of the complainant's claim or demand—As in the analagous case at law of a judgment by default, no proof would be necessary, it follows very conclusively, that it was not intended the act should apply to suits in chancery.—(See the case last cited.)

It is also insisted, that the admission by John Gayle, administrator of Matthew Gayle, of the justice of the

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complainant's demand, is sufficient proof. Waiving, for the present, the consideration of the question, whether an admission will in any case dispense with proof of the execution of a deed—such admission, if made, will not dispense with proof in this case. The persons in whose possession the negroes in controversy are, have answered, and do not admit the allegations of the bill.

The answer of John Gayle, if proof against him, is not proof against them. No rule of chancery is more conclusively settled, than that the answer of one defendant in chancery, cannot be read against another. With as little plausibility can it be contended that the notice which Mary Gayle had of the existence of the mortgage, at the time of her purchase of the negroes, will operate as an admission, and bind those claiming under her. Notice of the existence of a lien, will surely not supersede the necessity of proving the lien, when it is attempted to be enforced.

The complainant's counsel insists, that those in possession of the negroes, may be considered as *executors de son tort* of Mary Gayle. If it were true, that their acts would subject them to liability as such, they are not sued in that character; therefore, no decree can be had against them as such—('Toller's Law of Ex'rs, 36, 37; 4 Munf. 143.)

It is also insisted, that as John Gayle admits that he has three of the mortgaged negroes in his possession, a decree may be made against him for them, as the administrator of Matthew Gayle. By his answer, he shows that he claims two of them by purchase from Levin Gayle, who purchased them from Mary Gayle:

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the other belongs to the estate of Mary Gayle. It is a sufficient answer to this, that he is not proceeded against as a purchaser with notice, but he is charged as administrator of Matthew Gayle. In the latter character, he is clearly not liable, as by the sale to Mary Gayle, the property passed out of the estate of Matthew Gayle.

In addition, it must be remarked, that as John Gayle claimed two of the negroes in his possession, by virtue of a purchase from Levin Gayle, who had purchased from Mary Gayle, no decree could be had against John Gayle, without making the legal representatives of Mary Gayle parties to the suit.

In a case circumstanced like this, it was improper to dismiss the bill generally,—it should have been dismissed without prejudice to any suit the plaintiff may hereafter think proper to institute.

The decree of the court below, must therefore be so far modified, as to dismiss the plaintiff's bill, without prejudice to any suit he may hereafter institute. The complainant must pay the costs of this court, and of the court below.

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1. A defendant, who does not regard the mandate of the subpoena, is understood to have set at defiance the authority of the law, and to place himself in contempt of the process of the court, and is subject to attachment.
2. As a general rule, a defendant who is in contempt, cannot be heard before the court, and is not allowed to contradict the allegations of the bill, or bring forward any defence, or allege any new fact.
3. Nor is he allowed to appear and contest the complainant's demand, before the clerk and master to whom the bill was referred to take an account—but the inhibition can be removed at any time by filing a full and complete answer.
4. Where a defendant, served with a subpoena in chancery, neglects to appear, so that the bill is taken *pro confesso* against him, and referred to the clerk and master to take and report an account, it is not necessary that it should appear from the report made under the reference, that the defendant had notice of the time and place of taking the account.
5. A mortgage is regarded in equity, as a security for the debt, and when it becomes forfeited, the mortgagee may take proceedings to make the security available, if so authorised by the terms of the mortgage.
6. Where a party executes a mortgage for the security of several sums of money, to fall due at different times,—upon default in the payment of the debt which first falls due, the mortgage, *pro tanto*, becomes forfeited; and the mortgagee may proceed for a foreclosure and sale of the mortgaged premises:—
7. Though the mortgagor may stop proceedings by paying or tendering what is due upon the mortgage.
8. Where a party executes a mortgage for the security of several sums of money, payable to the same person, and to fall due at different times, if on default, in the payment of the first sum,

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the mortgagee file his bill to foreclose the mortgage, and pending the suit the other debts fall due, it is competent to take an account of all the debts intended to be secured, and to decree a sale for their payment.

9. Where a bill for the foreclosure of a mortgage, and a sale of the mortgaged premises, has been pending, and the defendant served with *subpœna* for several terms, it is competent to refer the bill to a master, to take and report an account, to receive his report, and render a final decree in the case at the same term.
10. It is not necessary in a decree for the foreclosure of a mortgage and a sale of the mortgaged premises, to prescribe some future day, for the payment of what may be due upon the mortgage, before a foreclosure and sale.
11. The sheriff is competent to execute a decree for the sale of mortgaged premises, upon the foreclosure of the mortgagor's equity of redemption, and the decree need not require a return of the proceedings thereon to the court.

Error to the Circuit court of Mobile, exercising chancery jurisdiction.

Bill of foreclosure, tried before *Harris, J.*

In this case, the defendant failed to appear and answer, and the bill was referred to the clerk and master to take an account. The defendant appeared before the master to contest the claim of complainant, and exceptions were filed to the report, which were overruled. The defendant was foreclosed of his equity of redemption, and the mortgaged premises ordered to be sold, unless the amount claimed was paid by defendant.

To reverse this decree, a writ of error was taken, and the following errors assigned:

1. There was no service of *subpœna* upon the plaintiff in error: nor any appearance by him in the cause,

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until after judgment *pro confesso* was taken against him, and order of reference made to the master.

2. The chancellor overruled plaintiff's exceptions to the report of the master.

3. The report of the master was made to the court unreasonably soon after the order of reference, thus depriving plaintiff of his legal right of contesting the same: there being no rule prescribed by the chancellor for the course of his proceeding.

4. The final decree ordered the mortgaged premises to be sold, without giving any reasonable day of payment to the plaintiff in error, or directing any report of his proceedings thereon by the master to be made to the court.

Thornton, for plaintiff in error.

Campbell, contra.

Thornton, for plaintiff in error. There was no service of process or appearance, before the order *pro confesso*, and therefore the exceptions of defendant to the report of the master, ought to have been sustained—(Aik. Dig. 287; 3 Bibb, 1.) The report was premature, because made without express directions prescribing the mode of proceeding—(Aik. Dig. 289.) The final decree should have given day to the plaintiff in error, by decree *nisi*—and the report of the master should have been made to a future term of the court—(2 J. J. Marsh. 117; 1 Mon. 66; 1 Bibb, 526, 528; Hard. R. 520; see Pirtle's Digest, 2 vol. 93.)

Campbell, in support of the decree below, contended,

that the master is not required to give a notice to any party, unless required to do so in the order of the court making the reference, or by a rule of the court—(Hoffman's Ch. Pr. 520.) The chancellor never makes such an order when the party is in contempt, as a matter of course—(4 Hen. & Munf. 483; Jac. Ch. R. 30; 4 E. Con. Ch. R. 344; Hoffman's Ch. P. 520.) When mortgaged premises are ordered to be sold, no time for redemption is allowed in the decree—(4 John. Ch. R. 140; 5 Ohio R. 544; 9 Price, 30.) The report and decree were not made too soon—(Aik. Dig. 288.) Equity will notice instalments falling due upon a mortgage, after the commencement of the suit—(Adams et al. vs. Essex et al. 1 Bibb, 149; 3 Pow. Mort. 903; 1 Paige, 450; 5 Paige, 40.)

COLLIER, C. J.—In the arguments at the bar, the following points have been raised upon the assignments of error:

1. Where a defendant, served with *subpœna* in chancery, neglects to appear, so that the bill is taken *pro confesso* against him, and referred to the clerk and master to take and report an account, is it necessary that it should appear from the report made under the reference, that the defendant had notice of the time and place of taking the account?

2. Where a party executes a mortgage for the security of several sums of money, payable to the same person, and to fall due at different times, if on default in the payment of the first sum, the mortgagee file his bill to foreclose the mortgage, and pending the suit the other

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debts fall due, is it competent to take an account of all the debts intended to be secured, and to decree a sale for their payment.

3. Where a bill for the foreclosure of a mortgage, and a sale of the mortgaged premises, has been pending, and the defendant served with *subpœna* for several terms, is it competent to refer the bill, &c. to a master, to take and report an account, to receive his report, and render a final decree in the case at the same term?

4. Is it necessary, in a decree for the foreclosure of a mortgage, and a sale of the mortgaged premises, to prescribe some future day for the payment of what may be due upon the mortgage, before a foreclosure and sale.

5. Is the sheriff competent to execute the decree for the sale of mortgaged premises, upon the foreclosure of the mortgagor's equity of redemption, and should not the decree require a return of the proceedings thereon to court.

1. By the second section of the act of eighteen hundred and twenty-three, "to regulate proceedings in chancery suits," (Aik. Dig. s. 14, p. 287,) it is provided, that if the defendant does not file his answer within the time prescribed by law, after the service of *subpœna*, "the bill shall be taken *pro confesso*, and the complainant, if he deem it necessary, may take an attachment to compel an answer." A defendant, who does not regard the mandate of the *subpœna*, must be understood to have set at defiance the authority of the law, and to place himself in contempt of the process of the court. It is on this legal assumption, that he subjects himself to an attachment. And, according to the practice prevailing in the English Chancery, a party who does not regard its pro-

cess, or is disobedient to its orders, is considered as in contempt, and, as a *general rule*, cannot be heard before the court; (Vowles *vs.* Young, 9 Vesey, jr. 172,) certainly not to contradict statements, or state any new facts on his own part. In ——— *vs.* Lord Gort, (1 Hogan, 77,) a motion was made for a receiver, on process to a serjeant-at-arms. The solicitor of the defendant, who was in contempt, opposed the application. *The Master of the Rolls* observed: "The general rule is, that when a party is in contempt, he will not be allowed to oppose the relief sought by the plaintiff, by contradicting the allegations in his bill, or bringing forward any defence, or alleging new facts; neither will he be heard by affidavit, except it be made with a view of purging his contempt. But he may be heard to direct the attention of the court to any error or insufficiency in the plaintiff's own case, as made by the bill."

In Heyn *vs.* Heyn, (Jacob's R. 49; 4 Cond. Eng. Ch. R. 25,) the defendant was served with subpoena, but declined answering, and stood out all process of contempt. The case was then set down for hearing, and an order obtained for taking the bill *pro confesso*, and a decree for an account before the master. The defendant, at the next term thereafter, moved that he might be at liberty to put in his answer forthwith, which he undertook to do, and to pay the costs occasioned by his contempt, and that all further proceedings as to the bill being taken *pro confesso*, be stayed, the defendant submitting to such decree as the court should think fit. *The Lord Chancellor*, in delivering his opinion, said: "I apprehend that when the bill is taken *pro confesso*, the defendant is not

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at liberty to go before the master without an order; but the accounts are to be taken *ex parte*; and they may charge him with whatever they can. My apprehension is, that after suffering the cause to go on till a decree is made *pro confesso*, he cannot be relieved, and permitted to come in as a party to the account for his own benefit, except on paying all the costs, and on a special application—and I think there is a necessity for such an order.” —(Maynard vs. Pomfret, 3 Atk. 468; Clark vs. Dew, 4 Cond. Eng. Ch. R. 344.) Thus, we think it very satisfactorily appears, that a defendant who is in contempt, will not be allowed to contradict the allegations of the plaintiff’s bill, bring forward any defence, or allege any new facts; and that one against whom a bill is taken *pro confesso*, for a failure to appear and answer on service of process, is in contempt, we think, quite as clear; and he cannot consequently insist upon a right to appear before the clerk and master, to whom the bill has been referred to take an account—(4 Hen. & Munf. R. 483.) A defendant here, will have no just cause to complain that he has not been allowed to contest the plaintiff’s demand before the master, since the inhibition results from his own neglect or perverseness, and may be removed at any time. “by filing a full and complete answer” to the plaintiff’s bill—(Aik. Dig. s. 18, p. 288.) While, according to the English practice, a defendant can only be relieved from the consequences of such a contempt, by application to the court, and submitting to such terms as it may impose—(4 Cond. Eng. Ch. R. 25 and 344.)

2. A mortgage is regarded in equity as a security for

the debt. When it becomes forfeited, so as to authorise the mortgagee to take proceedings to make the security available, must depend upon the terms of the mortgage. In the case before us, the plaintiff in error stipulated with the defendant, to pay him several sums of money at different times, and conveys to him a lot in the city of Mobile, conditioned that the conveyance shall be void, if these sums shall be paid at the periods agreed on. Now, we consider it clear, that upon default in the payment of the debt which first fell due, the mortgage, at least *pro tanto*, became forfeit, and the mortgagee might proceed for a foreclosure and sale of the mortgaged premises. The mortgagor, it is true, might have stopped the proceeding, by paying or tendering so much as was then due upon the mortgage—(Saunders et al. vs. Frost, 5 Pick. Rep.) But having failed to do this, and suffered the case to progress till the other instalments became due, how can he with propriety say to the mortgagee, that you shall only have your decree for so much as was due when you exhibited your bill? It frequently so happens, that the property mortgaged consists of one entire parcel, which could not be divided, or would be greatly lessened in value by division. Suppose, in such a case, a decree should be had for a sale, before the entire sum intended to be secured fell due, could the mortgagor insist upon being paid the excess produced by the sale? We apprehend not. If he could, the right to coerce a sale upon the first default, instead of being beneficial, would often be injurious to the mortgagee, if he were to avail himself of it; for having sold the mortgaged premises and paid over the excess, his security would be gone, and he

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thrown upon the personal responsibility of the mortgagor. In such a case, there could be no doubt but the powers of equity would be competent to make such disposition of the money, as to charge it with the satisfaction of the other instalments, provided for by the mortgage. The mortgage, we have said, becomes forfeit by the first default, and suit may be immediately brought. If, pending the case, other sums become due, what principle of equity inhibits their recovery in the same suit. The bill, if properly drawn, would disclose the entire case, accompanied with copies of the *mortgage, bonds, notes, &c.*, so as to enable the court to render perfect justice between the parties. But the question does not rest alone upon its intrinsic justice. In *Smith vs. Shuler*, (12 Serg. & R. Rep. 240.) it was determined, that an ejectment might be maintained on a mortgage payable by instalments, before all the instalments became due, so as to let the mortgagee into possession—(See also *Eastbrook vs. Moulton*, 9 Mass. 258.) We cite these cases merely to show that the mortgagee's right to subject the security to the payment of his debt, is complete upon the first default. But *Adams et al. vs. Essex et al.* (1 Bibb's R. 149,) is directly in point. In that case, it appeared that a mortgage had been executed to secure the payment of a sum of money by instalments. Upon a failure to pay the first instalment, the mortgagee brought his bill to foreclose: pending the bill the last instalment became due, and the Circuit court rendered a decree for all the sums secured by the mortgage. In the Court of Appeals, two questions seem to have been raised: 1st. Was not the suit prematurely commenced? 2d. Was the

mortgagee entitled to a decree for more than was due on his mortgage at the time his bill was filed?

In regard to the first question, the court say, that the case before it, being a suit in equity, ought rather to be "governed by the liberal principles which govern in covenant, assumpsit and special agreements, than those technical and rigid rules which are applicable to the action of debt only. We are, therefore, of opinion, that the suit was properly commenced, although but one of the instalments was due at the filing of the bill."

In respect to the second question, it is remarked, "that the chancellor having once jurisdiction of the cause, ought not to turn the parties round at the hearing, to begin *de novo*; but should go on to finish the controversy. In the case before the court, the last instalment became due before the cause was heard, so that the chancellor might well, as he has done, embrace the whole case in the decree." This conclusion seems to us so just in itself, that we are disposed to adopt as correct, the principle upon which it proceeds.

3. The bill, in this case, was pending for more than a year after the service of a subpoena on the plaintiff in error, and the decree was not rendered until the third term of the court after it was filed. Under these circumstances, the plaintiff cannot complain that the cause has been hurried to a close with unreasonable despatch. By the fifth section of the act of eighteen hundred and twenty-three, already cited, it is enacted, that "it shall not be required to file a replication to an answer; and in all cases where the answer is filed ten days before the sitting of the court, or the bill is taken *pro confesso* for

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want of an answer, the cause shall be heard and determined at that term, if practicable, unless on good cause shewn, either party continue the same."—(Aik. Dig. s. 17, p. 288.) This statute clearly authorises a final decree at the same term at which the order taking the bill *pro confesso* is made. In *Coates' executrix vs. Muse's administrators et al.* (1 Brock. Rep. 534,) a case uninfluenced by any statute or rule of court, Chief Justice Marshall said that the practice in the Circuit court for the Virginia district was to let the report of a master in equity, which was esteemed in any degree complex, lie to a second term for consideration and exception. In plain cases, the report is commonly acted on at the first term. Now, whether this point be considered as controlled by our statute or not, the practice of acting on reports at the first term, is to be governed by the court in its discretion, if the act is placed out of view.

4. It is the practice in England, upon the foreclosure of a mortgage, for the decree to direct, upon the non-payment of the principal and interest due, at a given day, that the mortgagor's equity of redemption be forever gone, and that the title vest in the mortgagee—(4 Kent's Com. 173; 3 Powell on Mortgages, 998, 999.) Though this is the general practice, yet, sometimes the mortgagee prays for and obtains a decree for the sale of the mortgaged premises, under the direction of an officer of the court, and the proceeds of the sale will, in such a case, be applied towards the satisfaction of a mortgage, and the excess, if any, paid over to the mortgagor.

The practice of naming some future day in the decree, when the money ascertained to be due should be paid,

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and previous to which day, the mortgagor's equity should not be foreclosed, proceeded, doubtless, from a consideration of the great injury frequently done to mortgagors, by wresting from them estates largely more valuable than the debts secured, without paying them the difference. To avoid such injustice, the English chancery not only gave day by the decree of foreclosure, but would actually enlarge the time of payment upon the application of the mortgagor, even more than once, especially if the mortgagee's security is considered ample—(3 Powell on Mortgages, 998, 999; 4 Kent's Com. 173.) Though such is the origin of this practice, yet, it is adhered to in the most of the States of the Union, notwithstanding it is the practice of all of them, (except some three or four,) instead of rendering a decree for a strict foreclosure, to direct a sale of the mortgaged premises; and the payment of the excess to the mortgagor. The practice has, in general, been tacitly acquiesced in, like many of the legal notions we have drawn from abroad, without enquiry whether it is applicable to the state of things here; hence it is, many rules of law are recognised as in force, long after the reason of their adoption has ceased. In England, it has been questioned by high authority, whether chancery, in its desire to prevent injury to the mortgagor, had not gone too far: for Lord Eldon himself regretted, that that court had ever varied the agreements of the parties in such cases—(Anon. MS. 2 Mad. Ch. 492.) And in Ireland and Scotland, it is said the rule does not exist. "for courts in these countries never interfere in the manner in which courts of equity do in England, to protect the borrower against the immediate pay-

ment of money vested in land. On this account, money is in those countries more frequently lent on mortgage than in England—(2 Madd. Ch. 492, n.) In Ireland, the decrees are always for a foreclosure and sale of the mortgaged premises, and though it is usual in practice to prescribe some day, within which payment is to be made, the time is never enlarged—(3 Powell on Mortgages, 962.) This question was considered by Chancellor Kent, in *Perine vs. Dunn*, (4 Johnson's Chanc. Reports, 143.) who there says that "the rule and the practice apply only to cases of strict foreclosure, where, by the decree, the equity of redemption is barred, and the complete title is vested in the mortgagee. The rule does not apply to cases of decrees for the sale of the mortgaged premises, according to our usual practice. The mortgagor, in such cases, is not subjected to a severe and absolute forfeiture of all his right, but he has the chance of the surplus moneys arising from the sale, and is placed upon the same footing of equality with debtors against whom judgments are rendered, and executions awarded at law." Considering the contract of the parties, there can be no well founded reason for extending the time of payment to any period beyond the decree: to do so, is but giving to the mortgagor an indirect bounty for his want of punctuality.

Besides, it must be remarked, that real estate is subject to levy and sale under a *fieri facias* in this country, the issuance of which is authorised immediately after judgment. Now, if it were required by a decree of foreclosure to give day to the mortgagor, a mortgagee would be in a less favored condition than a judgment creditor,

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though he had been so industrious as to secure his lien by contract. Such a distinction cannot be endured—it would be incompatible with justice, and calculated to disturb the harmony of the law; and as the reason of it has ceased, we cannot give it our sanction—(Higgins vs. West, 5 Ohio R. 554.)

5. The decree, in this case, is unusually brief. It merely confirms the report of the clerk and master, (which ascertains the amount due upon the mortgage,) adjudges that the mortgagor's equity of redemption be foreclosed, and that the mortgaged premises be sold according to law, unless the sum ascertained to be due, be paid by him. That it was competent for the court to have directed the sale to be made under the direction of the clerk and master, we have no doubt; yet, as the decree is silent in that regard, we think the execution is provided for by law, through the agency of a sheriff. The act of eighteen hundred and seven, "concerning executions, and for the relief of insolvent debtors," (Aik. Dig. s. 15, p. 162,) authorises the issuance of a *venditioni exponas* to the sheriff, to make the amount of the decree by a sale of the property mortgaged; and the acts in regard to the notice, and time and place of sales under executions on judgments at law, sufficiently indicate the proper course of procedure by the sheriff, in a case like the present.

The sheriff would, of course, make his deed to the purchaser, and return by endorsement on the process how he had executed it. If there was an excess of money produced by the sale, to that, as in ordinary cases, the mortgagor would be entitled; and the powers of the court

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over the sheriff, and the manner in which he had performed his duty, would be as ample as if the clerk and master had been substituted as a commissioner.

After considering all the points raised, our opinions are, that the proceedings of the Circuit court, though somewhat untechnical, are not erroneous; and the decree is consequently affirmed.

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1. A denial, in a case in admiralty, of the allegations of the petition, and concluding to the country, is the tender of an issue to a jury, and cannot be tried by the court.
2. And the tender of such an issue is a *request* for a trial by jury, and precludes the court from determining the truth of the facts put in issue.

Error to the County court of Mobile, exercising Admiralty jurisdiction.

The defendant in error filed his libel below, against the steamer Fox, for sundry goods, wares and merchandise, furnished for the use of the vessel. The plaintiff in error answered, denying the truth of the allegations contained in the libel, which he prayed might be enquired of by the country. The court, by its decree, condemned the vessel, her tackle, apparel and furniture, for the payment of the debt, with interest and costs. To reverse which, a writ of error was taken, returnable to this court.

Gayle vs. Preston.

Thornton, for the plaintiff in error.

Porter, contra.

ORMOND, J.—This was a petition, in the nature of a libel in admiralty, filed in the County court of Mobile county, by the defendant in error, against the steamboat Fox. A monition issued, and was returned, executed. A replevin bond was executed by the master of the boat. An appearance was afterwards entered in the following words: "And Andrew J. Gayle, who claims the said boat as his own, which claim is admitted by the court, intervening for his interest, answers and says, that he denies the truth of the allegations contained in said bill; that the said allegations, and every part thereof, are untrue, and this he prays may be enquired of by the country." The court afterwards rendered judgment, without the intervention of a jury. This is the error assigned:

The statute provides that all issues, at the request of either party, shall be tried by a jury. The answer, in this case, denying the allegations of the petition, and concluding to the country, was a tender of an issue to the jury; and could not be tried by the court, without some waiver which does not appear on the record. The tender of an issue in these terms, must be understood to be such a "request" for a trial by the jury, as would preclude the court from determining the truth of the facts put in issue.

Let the judgment be reversed, and the cause remanded.

Currie vs. Thomas.

CURRIE VS. THOMAS.

1. Independent of statutory enactments, money cannot be lawfully paid to the clerk of court, in vacation; or in any manner than as the officer of the court, in term time—
2. As, on plea pleaded, when the cause of action is admitted to a partial extent; in the case of tender; and when money is paid into court in satisfaction of a judgment.
3. But, in these cases, the money is presumed to be brought before the court, and placed in the custody of the clerk, as the fiduciary of the court.
4. The only case in which a clerk is authorised by statute, to receive moneys, is, in satisfaction of a recognizance, entered into by defendants, who have allowed judgment to pass against them at the first term on petition and summons—(Aik. Dig. 275.)

Error to the Circuit court of Barbour county.

Assumpsit on a promissory note, tried before *Pickett, J.*

The defence, in this case, was, that a former action had been brought against defendant, by one Pugh, on the identical note, and that the defendant had paid the amount called for by the note, to the clerk of the court, whose receipt for the same was produced. Objections were made to the evidence, relied on to make out the defence, on the ground, that the clerk was not authorised to receive the payment—which were overruled by the court. Verdict and judgment for defendant.

The errors assigned were—

1. That the court erred in overruling the several objections to the admission of the testimony offered by defendant;

2. In giving judgment for the defendant, upon the verdict, when no plea was filed.

Porter, for the plaintiff in error.

GOLDTHWAITE, J.—There are several stages in the proceedings of a case, in which the clerk of a court is by law authorised to be the holder of the moneys which may be paid into court. Thus, on plea pleaded, when the cause of action is admitted to a partial extent, and denied as to the residue. So in the case of a tender—So, also, when money is paid into court in satisfaction of a judgment. In all these cases, however, the money is presumed to be brought before the court, and as it can have no custody of money, it of necessity remains with the clerk, as the fiduciary of the court. But independent of statutory enactments, no case is remembered in which money can be lawfully paid to the clerk in vacation, or in any other manner than as the officer of the court in term time, and the receipt of which is always shewn by some record of the court, or some proceeding yet on paper, but progressing to a record. To permit this officer to receive demands which have not been reduced to judgment, would bring about consequences of a most mischievous tendency, unless received at a time when he is presumed to be under the immediate control of the court—that is in term time, and then only in those cases where the performance becomes a duty imposed by the peculiar organization of the court.

We will now ascertain how far such a duty is imposed on him by statute. The ninth section of the act

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entitled "an act to regulate the proceedings in suits at common law," authorises the clerk to receive satisfaction of, and discharge the recognizance entered into by defendants who have allowed judgment to pass against them at the first term on petition and summons—(Alk. Dig. 275.) And by the act of eighteen hundred and thirty-four, entitled "an act to provide a more summary mode of collecting money from clerks," it is made their duty to receive and account for all such sums of money as may be paid to them by either party, as well after as before the issuance of execution.

Before the enactment of this last statute, a summary remedy had been given against clerks as well as against sheriffs and coroners, for failing or refusing to pay over monies collected or received by them. This act authorises a judgment against the securities as well as the officers, and hence we must conclude that it refers only to such monies as they are by law authorised to receive. Such has been the previous decision of this court in the cases of *Barton vs. Lockhart*, (2 Stew. & Por. 109,) and *Bobo & Johnson vs. Thompson*, (3 Stew. & Por. 385.)

It is not pretended that the money was received by the clerk in any one of the stages of the cause in which he was authorised to receive the money at common law; and the case is not covered by any of the existing enactments. Indeed, the admission of the evidence as proof, to the extent for which the court admitted it, can alone be maintained on the hypothesis, that a plaintiff, when he commences a suit, confers a general authority on the clerk of the court to receive the demand he has sued for.

The payment having been made to the clerk, at a stage

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of the suit when the law did not authorise him to receive it, was not such a payment as can in any manner affect, or prejudice the claim of the plaintiff.

Let the judgment be reversed and the cause remanded.

M'GILL VS. HAMMOND.

1. Where a writ of error is prosecuted on a judgment at law, and annexed there appears a decree in chancery,—the two cases cannot be thus confounded so as to authorise this court to consider the errors assigned on the decree.

Error to the Circuit court of Monroe county.

In this case, a writ of error was sued out, to reverse a judgment in debt, of the Circuit court of Monroe county, and a decree of the same court, exercising chancery jurisdiction, in a case between the same parties, was appended to the transcript sent up.

The error assigned was, that the court below erred in dismissing complainant's bill.

Phelan, for plaintiff in error.

Porter, contra.

PER CURIAM.—The only error assigned is, that the court below erred in dismissing the complainant's bill for the cause mentioned in the decree. The writ of error is not prosecuted in the case in equity, and the decree, which is appended to the proceedings in this suit, is no

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part of the record, and ought not to have been attached to it.

If there is error in the decree dismissing the bill, it is a matter which can be examined when that decree is sought to be revised; but the two cases at law and in equity cannot be confounded together, and made one case, for any purpose.

Let the judgment be affirmed.

ROBERTS VS. ADAMS.

1. Where one signs his name to a blank piece of paper, with intent that it shall be filled up, as a note or endorsement, he is liable on the same, although the person intrusted with it shall violate the confidence reposed in him, by filling it up with another sum, or using it for another purpose, than the one intended.
2. Such a blank, is a letter of credit to any amount which the person to whom the same is confided, may choose to insert in it.
3. And if such a blank be obtained by a firm, when in existence, and be filled up by one of the partners after its dissolution, each partner will be liable to reimburse the moneys paid by the signer or endorser in blank to the holder.
4. Where one lends his name on an instrument in blank, to partners as their security, and by the negligence of one partner, and the fraud of the other, the lender is compelled to pay the sum inserted in the blank instrument—he is entitled to reimbursement from either of the partners.
5. *It seems*, however, that if a blank be entrusted to one for the

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purpose of inserting a limited sum in it, or to be used for a particular purpose, and it be filled up with a larger sum, or used for a different purpose, than that contemplated by the signer or endorser of the blank, and the facts be traced to the knowledge of plaintiff, at the time he acquires possession of the instrument, it will prevent a recovery.

Error to the Circuit court of Dallas.

Assumpsit tried before *Harris, J.* The action was brought to recover of defendant for money paid, laid out and expended, lent and advanced, for defendant by plaintiff: also for money by plaintiff paid as security for defendant, and one Henry Ross, on a note executed by Ross & Roberts, Alfred Roberts and plaintiff, dated Mobile, twenty-fifth February, eighteen hundred and thirty-four, payable sixty days after the date thereof, to White & Seymour, for eight hundred dollars. Also for money plaintiff had paid as security to defendant, and said Ross, in the note above described, on which note a judgment was rendered in the Circuit court, at the Spring term, eighteen hundred and thirty-six, against plaintiff and said Ross & Roberts, in favor of Phillips & Edwards, for nine hundred and twenty-three dollars 56 cts., besides costs, which judgment had been paid and satisfied by plaintiff.

On the trial of the cause, it was proved, that the defendant had been in partnership with one Ross, and that while so in partnership, the plaintiff had signed, as one of the securities, for the firm of Ross & Roberts, a blank, to be filled up with a note of five hundred or one thousand dollars, for discount at the Montgomery branch bank. The blank not being so used, remained in the drawer of the store house of Ross & Roberts, until after

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their dissolution, when Ross had the closing of the business, and there was evidence conducing to prove, that Ross had, after the dissolution, filled up the blank with a note of eight hundred dollars, to White & Seymour, negotiable at the State branch bank at Mobile, in payment of a partnership debt. The plaintiff had been sued on this note so filled up, and the amount recovered and collected on execution.

The defendant asked the court, to charge the jury, that the plaintiff could not recover, if the blank had been filled up by Ross, after the dissolution, even to pay a partnership debt—which was declined by the court.

The plaintiff in error, assigned the refusal of the court to charge as desired, as error.

J. B. Clarke, for plaintiff in error.

Phillips, contra.

J. B. Clarke, for plaintiff in error. In this case, the questions for the court are—When did the liability on the note commence? Was it before or after the dissolution? When did the contract with White & Seymour on this note, originate? This does not present any question, as to the rights of an innocent holder, or innocent security, or publication of dissolution, as seems to be supposed by the counsel for the defendant in error; but the bare question—when was the contract made?—as to which, see *Chitty on Bills*, (Ed. 1836,) 53, 61; *Kilgour vs. Finlyson, &c.* 1 H. Black. 155; *Wrightson vs. Pullan*, 1 Star. R. 375; 2 Scr. & Lowber's R. 433; *Wright, &c. vs. Pulham*, 2 Chit. R. 121; 18 Eng. C. L. 271.

The case of Abel vs. Sutton, (3 Esp. R. 108,) is considered full to the point, that Ross could not fill up the note after the dissolution, so as to bind Roberts. In the appendix to the above edition of Chitty on Bills, 845, there is also a note of a case in 3 Vermont R. which is considered identical in principle, if not in fact.

Phillips, for the defendant in error. The note in question was signed in blank, and though filled up by the principal maker for a larger sum, and for a different purpose than was understood by the security (Adams) at the time he signed the paper. It was competent for the principal to do so, and the case being free from fraud, the note is available in the hands of an innocent holder—(See Chitty on Bills, 33, and note, last edition; 2 Con. Rep. Sup. Court U. S. 214; 4 Campbell's R. 97; 4 Mass. R. 45; 1 Selwyn's N. P. last edition, 289; Chitty on Bills, 313, last edition.)

No notice of the dissolution of the co-partnership having been given, it was competent for one member to bind the firm, more especially with one who had had previous dealings with the concern—(See Collyer on Partnership, 310, 311; Chitty on Bills, 58, 59; 6 Cowen's R. 701.)

The defendant (Adams) having paid the debt as security of Ross & Roberts, and not being privy to the filling up of the note by Ross, he is certainly entitled to recover of Roberts, as the money was paid on account of the co-partnership.

GOLDTHWAITE, J.—It is insisted by the counsel for

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the plaintiff in error, as the note signed by Ross & Roberts, and the defendant in error, was put in circulation after the dissolution of the partnership, that it was not binding on Roberts, and consequently, that he is not liable to reimburse the defendant in error. We do not consider this as the question presented by the facts stated in the bill of exceptions. Adams became the security at the request of the partners, and if he was placed in a situation in which the amount of the note could be legally recovered from him, there can be no doubt but that each of the partners is liable to refund him the money he has paid.

It would not have availed him as a defence to the note, when sued by White & Seymour, or their endorsee, to have proved every fact which is stated, unless he could have brought home to the plaintiff in that action, a knowledge of the circumstances under which his signature to the blank note was obtained, and no such knowledge is pretended. No rule can be better settled, than the one which determines that he who signs his name to a blank piece of paper, with intent to be filled up as a note or endorsement will be liable, although the person entrusted therewith, shall violate the confidence reposed in him, by filling it up with another sum, or using it for another purpose than the one intended—(Collis vs. Emmett, 1 Hen. Black. 313; Russel vs. Langstaffe, Doug. R. 496; Snaith vs. Mingay, 1 M. & S. R. 87; Crutchly vs. Mann, 5 Taunt. R. 529; Pasmore vs. North, 13 East. R. 517; Crutchley vs. Clarence, 2 M. & S. R. 90; Brahan vs. Ragland, 3 Stewart, 247; Violetts vs. Patton, 5 Cranch, 142; Mitchell vs. Culver, 7 Cowen, 336; Putnam vs. Sullivan, 4 Mass. R. 45.)

If it was admitted that Roberts was not liable on the note, to a *bona fide* holder of it, because of the want of authority in his partner to bind him at the time it was filled up, this would not change the aspect of the case, as the defendant in error would clearly be liable to such a holder; as the blank signed by him was a letter of credit to any amount which those to whom he confided it might choose to insert in it. The case does not differ in principle from one in which the *name* of the defendant in error should appear as the only signature to the note. In such a case, if borrowed or obtained by the firm when in existence, and filled up by one of the partners after its dissolution, each partner, it is conceived, would be liable to reimburse the money paid, because the credit and confidence was given to the partnership, and not to the individual.

We do not advert to the fact, that the note was passed away in payment of a debt, for which Roberts was unquestionably bound in law, it having been contracted during the continuance of the partnership. This debt has, in effect, been paid by Adams; but however strong this equitable ground may appear, we prefer that our decision shall rest on the sole ground, that Adams lent his name to the partners, as their security, and that they by their acts, (the negligence of the one, and the fraud of the other,) have caused him to pay the amount recovered against him. He is clearly entitled to reimbursement from either partner.

Let the judgment be affirmed.

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1. Every court of justice, of necessity has the power, whilst the papers of a cause are *in fieri*, to supply a loss occasioned either by accident or design.
2. Where the commissioner, appointed to take a deposition, has omitted to certify it by his signature, the deposition cannot be read in evidence; but the omission of the seals will not operate to exclude the depositions.
3. Where a point reserved for the determination of the Supreme court, will with equal propriety admit of a construction which will support or defeat the judgment of the court below—the former will be adopted as the true construction. The party wishing to avail himself of an alleged error in the judgment of an inferior court must reserve the point, and present it on the record with reasonable certainty.
4. A decision on the probate of a will, is a judicial proceeding, and the court in which it is registered is a court of record, and if the presiding judge is also clerk of the court, he has authority to test the records of his court in both capacities.
5. All courts in the United States, take judicial notice, that tribunals are established in the several States, for the adjudication of controversies, and the ascertainment of rights.
6. The certificate and seal which gives verity to a record, unless the record itself discloses the want of jurisdiction, establishes as well the right of the court, to adjudicate the matter contained therein, as that such facts were adjudicated.
7. A witness cannot be examined to any distinct collateral fact, for the purpose of impeaching his testimony afterwards:—But if the witness voluntarily swears falsely in relation to matters not within the issue, he may be impeached by contradicting him.
8. A defendant in trover, may defend himself, by shewing title in a third person, and so also may a defendant in detinue.

9. But a mere trespasser cannot set up an outstanding title in a third person, without connecting himself with it.

Error to the Circuit court of Autauga.

Detinue, tried before Judge A. Martin. Plaintiff declared against defendant in detinue, for several slaves which defendant had taken from the possession of plaintiff and unlawfully detained. Plea—*non-detinet*. Verdict and judgment for plaintiff.

On the trial of the cause, the plaintiff proved that he acquired the possession of the slaves, the subject of the controversy, on his intermarriage with one A R in South Carolina, in the year eighteen hundred and thirty-two. On first January, eighteen hundred and thirty-six, defendant seized and took said slaves from the agent of the plaintiff without authority. The slaves had been demanded of the defendant, and he had refused to deliver them.

Defendant introduced a deed of gift from A. R., conveying to her infant daughter, Elizabeth A. M. Ramsey, the slaves (and divers other property) the subject of the suit. The marriage with plaintiff took place about three weeks subsequent to the execution of the deed, and the execution of the deed, and the intended marriage, were spoken of before the marriage in the neighborhood.

The deposition of a witness was offered in evidence by defendant, to which plaintiff objected on the grounds:

1. That the affidavit on file in the clerk's office, to obtain the commission to take said deposition, was without the attestation of the clerk—nor did it appear by any certificate of the clerk, that the same had been sworn to.

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2. That the commissioners who took the deposition did not certify the same under their hands and seals.

On the first point, the court decided that the clerk might then be sworn, and state whether or not the affidavit had been duly made and sworn to, at the time the commission issued—to which plaintiff excepted. The second objection was sustained by the court, and the testimony rejected, to which defendant excepted.

Plaintiff offered in evidence, a paper purporting to be a transcript of the last will and testament of J. R., deceased, of Greenville district, South Carolina, (said J. R. was the former husband of A. R.,) by which the property was bequeathed to A. R. for her life, and to her daughter after the death of said A. R. The will was certified to be a true copy, by the ordinary of the district, who was both judge and clerk of the court. Defendant's counsel objected to the transcript, and the endorsements, going to the jury, as evidence, but the objections were overruled by the court, to which defendant excepted.

Plaintiff introduced evidence of a conversation, between one Tandy Walker and the plaintiff's wife, which was objected to by defendant, but was permitted to go to the jury by the court, for the purpose alone of impeaching the testimony of one of defendant's witnesses, who was proven to have been present, but denied having heard any such conversation—To the admission of this testimony, defendant excepted.

After the trial had progressed some time, it was ascertained that the writ and declaration were lost, although the declaration had been in the hands of the jury, and all the papers had been before the court, some time after

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the trial had commenced. Plaintiff moved the court for leave to substitute a new writ and declaration, which was permitted by the court—to which defendant excepted.

The court charged the jury, that if they believed that said deed was made on the eve of an intended marriage, and without the knowledge of the plaintiff, it was a fraud on his marital rights, and void, so far as the plaintiff was interested—to which defendant excepted.

The court further charged the jury, that if they believed that the plaintiff had been in peaceable possession of the property, for more than three years; that a tortious taker could not avail himself of a better title in a third person—to which defendant excepted.

The following is the certificate of the ordinary, endorsed on the will received in evidence:

“South Carolina: Edgefield district. I, Oliver Towles, ordinary of the district aforesaid, do certify, that the foregoing pages contain true copies of the will,” &c.—“that by the laws of the State, I, as ordinary aforesaid, am keeper of all books, papers and records, relating to the office of ordinary, or to the probate of wills, administration, &c., and am also sole judge of the court of ordinary, for the district aforesaid, subject to appeal to the court of common pleas; and that this certificate is in due form of law, and by the proper officer.

“Given under my hand and private seal, (there being no seal of office,) at Edgefield, this 28th day of March, A. D. 1837. OLIVER TOWLES, O. E. D. [seal.]”

“The State of South Carolina. I, the the undersigned, Baylis J. Earle, one of the circuit judges of the Su-

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perior court of law, and a presiding judge of the district of Edgefield, do hereby certify, that Oliver Towles, who hath signed the within certificate, is, and was at the date thereof, judge and register of the court of ordinary, for the said district of Edgefield, having jurisdiction of the probate of wills, and the granting of letters of administration, on the estates of intestates, and of the accounts of executors and administrators; and also having the lawful custody of the records appertaining to the said court of ordinary:—That his certificate above is in due form, and entitled to full faith and credit.

“Given under my hand, this 29th day of September, 1837. B. J. EARLE.”

The following errors were assigned:

1. The court below erred in allowing a new writ and declaration to be substituted, as shewn by the bill of exceptions.

2. The court erred in the several instructions or charges given to the jury, on the trial of the cause, which are stated in the bill of exceptions.

3. The court erred in permitting the evidence to be given to the jury, of a conversation between the wife of the plaintiff in the court below, and Tandy Walker.

4. The court erred in admitting a transcript of the will of the former husband, of the wife of plaintiff, as evidence.

5. The court erred in rejecting the deposition, offered during the trial of the cause, by defendant below.

6. The record shews no declaration, writ or plea.

Parsons, for the plaintiff in error.

Dargan & J. B. Clarke, contra.

Parsons, for the plaintiff in error, contended—

1. That defendant in detinue may prove title in a third person—(2 Stark. Ev. 494; 14 J. R. 128; 11 J. R. 529, 300; 1 Wash. R. 308; *Carroll vs. Pathkiller*, 3 Por. R.; 3 Stark. (trover) 1504.

2. That a widow about to marry, may give part of her property to her child by the first husband—(2 Porter's Rep. 527; 1 Vern. Rep. 408; 2 P. Williams' Rep. 674; 2 Brown's Ch. Rep. 345; 2 Des. Rep. 264; Sug. Vend. 459; Harper's Ch. Rep.)

3. Where the pleadings are lost, copies on *affidavit* should not be received—(1 Stark. R. 187.)

4. The court should not permit a witness to be contradicted on an immaterial or collateral point, to discredit him—(3 Stark. 1754, top; same vol., note 1, page 1739.)

ORMOND, J.—The questions of law arising out of the record, in this cause, will be considered in the following order:

1. Had the court the power to substitute copies of the writ, declaration and pleas in the cause, on an affidavit of their loss during the trial of the cause?

2. Was the court correct in rejecting the deposition of Lucretia Thompson?

3. Did the court err in permitting the transcript of the will of John Ramsey, deceased, to be read in evidence to the jury?

4. Was the objection well taken, to the evidence admitted by the court, to impeach the testimony of one of the witnesses of the plaintiff in error?

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5. Did the court err in charging the jury, that if the negroes sued for had been in the peaceable possession of the plaintiff, that a wrong-doer could not avail himself of a better title in a third person?

Every court of justice must of necessity have the power, whilst the papers of a cause are *in fieri*, to supply a loss occasioned either by accident or design. If this were not so, its progress could be stopped at any time, by the wilful abstraction of part of the papers of a cause from the files, or by a casual loss, consequent on the hurry and confusion of a *nisi prius* court. This is a conservative principle, which must inhere in all courts; and in its application, is analogous to the familiar rule of evidence, authorising the reception of secondary proof, when the best evidence cannot be had. The records of the court being the highest grade of evidence, can in general be proved only by themselves; whether there may not be cases, when even this rule might yield to stern necessity, it is not necessary now to determine, as the papers permitted to be substituted in this case, were not records.

It was strenuously urged by the plaintiff's counsel, that in every case in which secondary evidence of a written instrument is received, an opportunity is afforded the adverse party, of questioning its loss, and disputing the truth of the secondary proof, which was not permitted in this case, as the judgment of the court was *ex parte*.

The answer to this objection is, that the whole matter passed under the eye of the court. The presiding judge was certified of the former existence of the papers, not only from their having been read to the jury, as in

this case, but also from the memorials extant on the docket, and minutes of the court. The adverse counsel were present, and if any attempt had been made to foist into the cause untrue copies of the lost papers, the attempt could be resisted by counter affidavits, in which event the court would require the most plenary proof. In this case, the opposing counsel did not even suggest that the substituted papers were not substantially correct; we cannot therefore doubt, that the court was right in receiving them.

It has been determined by the Supreme court of New York, that a writ of *feri facias*, after it had been levied and accidentally destroyed by fire in the officer's house, that the lost paper could be replaced by a copy—(3 John. Rep. 418; White vs. Lovejoy; see also 2 Burrow's Rep. 1072; 4 Term. Rep. 514.)

The objection to the reading of the deposition of Lucretia Thompson, is so inartificially presented, that we are unable to say what point was intended to be raised for revision in this court. It is uncertain whether the objection was, that the commissioners who took the depositions, did not certify it by their signatures, or that their certificate was not sealed. If the former was the alleged defect, it was sufficient to exclude it; if the latter, it was not. When a point, reserved for the determination of this court, will with equal propriety admit of a construction which will support or defeat the judgment of the court below, we must adopt the former as the true construction. The party who wishes to avail himself of an alleged error in the judgment of an inferior court, must reserve the point, and present it on the record with reasonable certainty.

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The objection to the introduction of the transcript of the will of John Ramsey, is founded on the supposed insufficiency of the certificate of the clerk. It is in these words:

"South Carolina: Edgefield District.

"I, John Towles, ordinary of the district aforesaid, do certify, that the foregoing sheets, &c. &c.—that by the laws of the State, I, as ordinary aforesaid, am keeper of all books, papers and records, relating to the office of ordinary, or to the probate of wills, administration of estates, or accounts of executors and administrators, and am also sole judge of the court of ordinary for the district aforesaid, subject to appeal to the court of common pleas; and that this certificate is in due form, and by the proper officer. Given under my hand and probate seal, (there being no seal of office.)"

The act of Congress of seventeen hundred and ninety, providing for the authentication of the records and judicial proceedings of the courts of any State, by the attestation of the clerk with the seal of the court annexed, together with the certificate of the presiding judge, must be held to reach such a case as this, or it is not provided for; as the act of eighteen hundred and four, for the authentication of records, not judicial proceedings, will not apply. The decision on the probate of a will is a judicial proceeding, and the court in which it is registered, a court of record, and if the presiding judge is also clerk of the court, he must have authority to attest the records of his court in both capacities. This has been done in this case.

In the case of *Bessell vs. Edwards*, (5 Day's R. 368,) it

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was held, that when a justice of the peace holds a court of record, and has no clerk, he may certify these facts: that there is no seal, and that his attestation is in due form, and that a record thus certified, would be evidence in another State.

So, in the case of Huff vs. Campbell, (1 Stewart, 543,) it was held, that a certificate made by one of the judges of the Supreme court of Tennessee, certifying that an individual was clerk of that court, was sufficient, notwithstanding the act of Congress requires such certificate to be made by "the judge, chief justice, or presiding magistrate"—it appearing from the law of Tennessee, that there was no chief justice or presiding magistrate of that court.

It was also objected, that it did not appear, that by the law of South Carolina, wills are required to be proved and recorded. All courts of the United States take judicial notice, that tribunals are established in the several States, for the adjustment of controversies and the ascertainment of rights.

Some tribunal must necessarily be charged with the duty of proving and recording wills and testaments; and it might as well be demanded in any case where a record of another State is offered in evidence, that the law creating the court and defining its powers, must be produced, as in this. The certificate and seal, which gives verity to the record, establishes as well the right of the court to adjudicate the matter contained therein, (unless indeed the record itself discloses the want of jurisdiction) as that such facts were in truth adjudicated.

It follows, that the court did not err in admitting the transcript.

The objection taken to evidence admitted to impeach one of defendant's witnesses, is thus stated in the bill of exceptions: "The plaintiff introduced evidence of a conversation between one Tandy Walker and the plaintiff's wife, which was objected to by defendant's counsel, but was permitted to go to the jury by the court, for the purpose *alone* of impeaching the testimony of one of defendant's witnesses, who was proven to have been present, but denied having heard any such conversation."

It is insisted by the counsel for the plaintiff, that the court permitted the testimony of the witness to be impeached, by proving that he had sworn falsely, in a matter not material to the issue. It is not easy to ascertain from the record, what point was really intended to be presented. What influence the conversation between Tandy Walker and the plaintiff's wife could have in the cause, or whether it was material to the issue or not, is difficult to say, without knowing what the conversation was, and under what circumstances it took place. Still less can it be ascertained from the record, whether the witness thus sought to be impeached, had voluntarily denied having the conversation, or whether it was brought out by the cross-examination of the plaintiff.

The rule is, that a witness cannot be examined to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him. But if a witness voluntarily swears falsely in relation to matters not within the issue, we can see no reason why he should not be impeached by contradicting him. The reason for the former rule, usually given, that the witness cannot be presumed to come prepared to defend

himself, on such collateral matters, fails, when the testimony is voluntarily given, or not objected to.

In the case of *Carlos vs. Brook*, (10 Vesey, jr.) in treating of this subject, Lord Eldon says, "It was not at all put in issue whether he (the witness) had been insolvent, or had compounded with his creditors; but having sworn the contrary, they proved by witnesses, that he who had sworn to a matter not in issue, had sworn falsely in that fact, and that he had been insolvent and had compounded with his creditors, and it would be lamentable if the court could not find means of getting at it, for he could not be indicted for perjury, though swearing falsely; the fact not being material—(See also *Purcell vs. McNamara*, 8 Vesey, jr. 324; *Tucker vs. Welch*, 17 Mass. 160; *Staple vs. Spohn*, 8 Serg. & Rawle, 317.)

In this case, from the construction we put on the bill of exceptions, it appears that the objection was not that the witness was compelled to answer to collateral facts, but to the right of the opposite party to contradict him, by showing that he had not sworn truly. From what has been said, it appears there was no error in this.

Could the defendant below protect himself by proving a better title in a third person?

That in the action of trover, the defendant may defend himself by showing title in a third person, is a rule frequently laid down in general terms in the books. To that effect are the cases cited by the plaintiff's counsel—(*Schermerhorn vs. Van Volkenburg*, 11 Johnson's Rep. 529, and *Rotan vs. Fletcher*, 15 Johnson's Rep. 207.)

The action, in this case, is detinue; but it is not perceived that any substantial distinction exists between

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the two actions as to this question. A general or special property in the chattel sued for, is sufficient to maintain either action.

No case has been cited to sustain the position of the plaintiff's counsel, that a mere trespasser can in either action set up an outstanding title in a third person, without in some way connecting himself with it. The contrary, however, has been held in the case of *Duncan vs. Spear*, 11 Wend. R. 54. In that case, it was determined that a mere prior possession obtained by a purchase under a void execution, was sufficient to prevent the defendant from setting up a title in a third person, without shewing some claim, title or interest in himself.

The court, in delivering their opinion, refer to the case of *Daniels vs. Bell & Brown*, decreed in the same court a few years before, in which the same principle was asserted.

The two cases from 11 and 15 Johnson's Reports, are briefly reported, but it appears in both cases that the defendant's came lawfully into possession, which materially distinguishes those cases from this. In this case, the defendant obtained the possession of the slaves by his marriage. They are tortiously taken from him by the plaintiff, without color of title on his part, or in any manner connecting himself with the title. To permit such a defence to prevail, would be to encourage violations of the law.

The argument most relied on by the plaintiff's counsel, and therefore deserving an answer, is, that if this recovery is allowed against the plaintiff, he cannot afterwards protect himself by the judgment, if sued by the

true owner. If it were true, that by his tortious act he has subjected himself to two actions, he certainly cannot found an argument on that fact, for his impunity, when sued by one whose possession he has invaded. But we do not see that this consequence follows.

The defendant, as husband, became entitled to all the personal property of the wife, in her possession at the time of the marriage, and may hold it until a better title is asserted. Having, then, the right to the possession, he has a right to recover for an injury done to it; and if the daughter of the wife, by virtue of the anti-nuptial gift, should hereafter assert and maintain her title to the property, it is not easy to conceive on what principle she could recover of the plaintiff in error, for an injury done to the possession, at a time, when that possession lawfully belonged to another, and for which injury, compensation had been made.

The view we have taken of this point of the cause, renders it unnecessary to consider whether the court decreed correctly as to the legal effect of the deed made by the wife of the defendant, a short time before the marriage to her daughter. Even if the decision of the court, that such a conveyance on the eve of marriage, without notice to the husband, is a fraud on his marital rights, and therefore void, *per se*, was wrong, it could not by possibility prejudice his rights, as the court had previously decided right, on a point which was decisive of the case.

The judgment is affirmed.

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1. By the act of eighteen hundred and twenty-one, abolishing the fictitious proceedings in ejectment, and substituting the action of trespass—the laws in force in relation to the action of ejectment, except so far as it related to the fictitious proceedings, were declared to be applicable to the action of trespass to try titles.
2. But the English *practice* in relation to ejectment, has not been adopted in this State.
3. The declaration, in trespass to try title, should describe the land in controversy with so much particularity and precision, as will inform the defendant what he is to defend against, and the court for what it is to render judgment.
4. Where one pleads “not guilty” to an action of trespass to try title, he is foreclosed from availing himself of an objection to the declaration—but may, in error, insist upon the insufficiency of the verdict and judgment—And
5. A verdict and judgment not specifying the lands, found illegally in a party's occupancy, with such certainty as will show where they lie, or the number of acres and extent of lines,—will not be sustained.

Error to the Circuit court of Mobile.

Trespass, to try title, before *Harris, J.*

Defendant plead not guilty. Verdict and judgment for plaintiffs; to reverse which, a writ of error was taken.

It was, in part, assigned in error—

That there was no proper or sufficient description of the land sued for, in the writ, declaration, verdict or judgment;—wherefore, for uncertainty, and because no

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particular quantity is named, described or identified, the said proceedings were erroneous.

Stewart & Thornton, for the plaintiff in error.

Campbell, contra.

Thornton, for plaintiff. The first assignment of error, is the vagueness of the whole record, from the writ to the judgment, in the description of the land sued for. It seems that the old rule, was such, that the party plaintiff need not be specific in that particular; but that he could point out to the sheriff who had a *habere facias possessionem*, and take possession of the proper land at his peril. This rule was anomalous and dangerous. (See a case limiting it in this court—*Sawyer vs. Fltz*, 4 *Stew. & Porter*, 365, and the cases cited.) The preliminary proof of the admission of the secondary evidence of the certificate of the register of the land office at Jackson, was insufficient. (See *Mitchell vs. Mitchell*, 3 *Stew. & Por.* 84, and *Bradford vs. Bradford*, in this court.)

Campbell, for defendants in error. The description in the declaration is sufficient—and if not sufficient, the defendant in the court below, could not object after the joinder of issue—(4 *Day's R.* 448, note; *Aik. Dig.* 265, 266, 342; 3 *Stew.* 61; *Harden's R.* 57, 58, 76; *Adams' Eject.* 18, 20; 4 *Binney*, 77.)

COLLIER, C. J.—The first question raised in this case, is, as to the sufficiency of the declaration, verdict and judgment, to entitle the defendants in error to their writ

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of habere facias possessionem. The land sought to be recovered, is described in the declaration as "situate in the county of Mobile, on the south side of three mile creek, at, or near the place called the *pass of suriague*, bounded on the east by lands belonging to Benjamin Dubroca, on the north by three mile creek, and on all other sides by lands vacant at the time the same was granted to the said John Murrell, that is to say, on the seventh day of May, eighteen hundred and four." The verdict merely negatives the truth of the plea, and finds the plaintiff guilty of the trespass charged in the declaration. The judgment adjudges to the defendant the possession, describing the land in the same general terms as are employed in the declaration.

By an act of the Legislature, passed in eighteen hundred and twenty-one, the fictitious proceedings in the action of ejectment, were abolished, and the action of trespass substituted as the mode of trying the right and title to lands, &c., and the laws then in force in relation to the action of ejectment, except so far as it related to the fictitious proceedings, were declared to be applicable to the action of trespass to try titles—(Aik. Dig. s. 41, 42, p. 265.) When the action of ejectment was first introduced into practice in England, very great certainty was required in describing the premises in controversy, by analogy to a *præcipe quod reddat* in a real action. But this severity has been relaxed in the courts of that country, and it is not now deemed *necessary* that the description should be *so certain*, that the sheriff, without the aid of the plaintiff, may know of what to give possession. In such cases, the sheriff delivers the possession of the

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premises recovered, according to the plaintiff's directions, who, in receiving it, acts at his peril—if he takes more or other land, he is a trespasser, and subjects himself to an action, or the court, in a summary way, will set right any injury the defendant may have sustained by divesting him of the possession of land not embraced by the recovery against him—(Runnington's Eject. 121, *et post*; Adams on Eject. 20, 21, 22, 23, 24, 25; 4 Day's R. 448.)

The English practice on this subject has not been adopted in this State. In *Jenkins vs. Noel*, (3 Stew. R. 75,) this court say, "that all reasonable and practicable certainty of description should be required, and that the correct rule of law does not permit a successful plaintiff, by indemnifying the sheriff, or otherwise, to exercise an arbitrary discretion, as to the quantity or particular location of the lands to be delivered under his recovery; but that the verdict and judgment must ascertain, to a common intent, the precise lot or tract recovered, and that this must appear, either in the verdict and judgment, or by the usual reference to the declaration." And in other States, a similar rule has been laid down. In *Clark vs. Clark*, (7 Vermont R. 190,) the court determined, that if lands are so imperfectly described in an action of ejectment, that it cannot be known for what the verdict was given, the judgment should be arrested. In *Fenwick vs. Floyd's lessee*, (1 Har. & Gill's R. 172,) it is said, that "an action of ejectment is a remedy given to the party to obtain the possession of lands which are wrongfully detained from him; and as the sheriff, after judgment, is to deliver the possession of the lands recovered, there must be such a description of them, as will enable him to effect

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that purpose." In that case, the plaintiff in the ejectment claimed "two hundred and fifty-one acres, being part of a tract of land, called, &c. lying and being in the county," &c. The entire tract was four thousand acres, and because a more particular locality was not given to the part claimed, the court held that the declaration, and a writ of possession conforming to it, were both defective.

In *Seward vs. Jackson*, (8 Cowen's R. 427,) the relaxation of the rule which required a description of the premises in the declaration, to be so certain, that the sheriff might know from his execution, of what he was to deliver possession, is said to have been productive of numerous and vexatious applications to correct the errors of the sheriff in delivering possession. And the settled rule of the Supreme court of New York, "where a general verdict is given for the plaintiff, is, to restrict him to the taking possession of so much only, as he gave evidence of his title to, on the trial"—(See also 1 Johns. Cases, 101.) In *Gregory vs. Jacksons*, (6 Munf. R. 25.) a verdict was returned in these words: "We, of the jury, find for the plaintiff, his term yet to come, in four hundred acres of land, parcel of the premises in the declaration mentioned, and in the possession of the defendant," &c. The Court of Appeals of Virginia, determined that the verdict was too uncertain to warrant a judgment for the plaintiff—inasmuch as it does not sufficiently designate the boundaries of the four hundred acres which it finds for the plaintiff, nor refer to any certain standard by which that defect may be supplied—(See also *Clay vs. White et al* 1 Munf. 162)

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In England, the action of ejectment is regarded as strictly a possessory action, and determines nothing but the right of possession at the time of the demise laid in the declaration. Here, trespass to try title puts in issue not only the right to possession at the time of suit brought, but the *fee simple title* also, and the judgment is conclusive against both parties and their heirs. The inconclusiveness of a judgment in ejectment, and the unimportant consequences resulting from it there, compared with a similar proceeding here, may have induced the relaxation in the English practice. Be this as it may, we do not conceive that the ends of justice would be at all advanced by tolerating it in this State. Here, the lands have been surveyed, and numbered by surveyors acting under the authority of the federal government. These numbers may be easily ascertained by a person desirous of instituting a suit. If the lines have become so much effaced by time or other cause, that it is difficult to trace them, a county surveyor, with the aid of the *field notes*, may readily ascertain them. And if it is necessary before trial, to give to the premises in dispute a particular location, upon the legal sub-division of which it is a part, an order of survey may be obtained for that purpose, and the jury find by their verdict, the precise parcel of land, of which the defendant wrongfully withholds the possession from the plaintiff.

Again: if a plaintiff is put in possession of land, which he has never recovered, or of more than he recovered, the defendant would be without an available redress, to compensate him for the time he was wrongfully kept out; where the plaintiff is unable to make

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good any loss he may sustain by the improper execution of the judgment; unless he be allowed to look to the sheriff for reparation. In any event, his remedy would often be tardy and vexatious, for unless the record discover what particular land was adjudged to the plaintiff, it would be necessary to show it by extrinsic proof, in order to set right the proceedings of the sheriff—a fact which it would be often difficult to prove.

Our conclusion is, that, in the action of trespass to try title, the declaration should describe the land in controversy with so much particularity and precision, as will inform the defendant what he is to defend against, and the court for what it is called on to render judgment. But, in the present case, the plaintiff in error cannot avail himself of an objection to the declaration—he is foreclosed by having pleaded *not guilty* in the Circuit court. The statute is express to the point—(Aik. Dig. s. 46, p. 266.) It is, however, competent for him to insist upon the insufficiency of the verdict and judgment.

The jury have found the plaintiff guilty of the illegal occupancy of lands belonging to the defendants, but where these lands can be found we are not informed. They are bounded on the east by lands belonging to Dubroca, on the north by three mile creek—but the record is entirely silent as to the extent of the lines running from north to south, or from east to west. These must be ascertained by a survey, aided by the *Spanish Archives*, in regard to the domain claimed by *Spain* in the year eighteen hundred and four, within the present limits of this State—a task requiring the exercise of judgment and industry. The land in dispute may, from

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any thing appearing to us, contain five, or fifty thousand acres: the judgment does not warrant the issuance of an execution for any definite number, and because of its uncertainty, cannot be sustained.

The questions of law arising upon the bill of exceptions, we have not had leisure to examine, and as the defendant's counsel has intimated that they will not arise upon another trial, we have declined their consideration.

The judgment is reversed, and the cause remanded.

Rogers vs. Rawlings et al.

ROGERS vs. RAWLINGS et al.

1. By the terms of the act of Congress of the tenth of May, eighteen hundred, a forfeiture did not accrue *immediately* on the failure of a purchaser of lands, to pay within the period of time, for which a delay of payment was given. The lands did not revert, until after they were *again* offered for sale in the manner specified in the act.
2. The act of Congress of the second of March, eighteen hundred and twenty-one, was a proposal to extend the term of payment many years, and required of the party accepting of the extension, to make a written declaration of his assent to the provisions of the act: one of which declared, that the land on which the further credit was taken, should be *ipso facto* forfeited to the United States, if the payments were not made within three months after the day appointed for the payment of the last instalment,—which became due on the thirtieth of September, eighteen hundred and twenty-eight.
3. The act of Assembly of this State, of the fourteenth of June, eighteen hundred and twenty-one, invested the executor or administrator of the decedent, with authority to claim the benefits of the act of Congress, on behalf of the estates they represented.
4. All the acts of Congress for the relief of the purchasers of public lands, expired on the fourth of July, eighteen hundred and twenty-nine; and all lands sold on credit, and not paid for on the fourth of October, eighteen hundred and twenty-nine, on that day, reverted to the United States: and every interest of a purchaser, or derived from him, was at an end.
5. A forfeiture under this and similar acts, requires no act of entry on the part of the United States, to make it complete and effectual.
6. The acts of Congress of eighteen hundred and thirty, and eighteen hundred and thirty-one, do not revive the estates of purchasers, previously forfeited to the United States.

7. The act of the thirty-first of March, eighteen hundred and thirty, gives a right of pre-emption of lands forfeited, to the purchasers, until the fourth of July, eighteen hundred and thirty-one, upon their paying the minimum price per acre, in addition to the amount theretofore paid thereon and forfeited; *provided* the price, including what had been paid, and the amount to be paid, should exceed three dollars and fifty cents per acre.
8. And where one had paid more than three dollars and fifty cents per acre, when the purchase was made, his heirs and assigns became entitled to a patent without paying any more money.
9. The act of the twenty-fifth of February, eighteen hundred and thirty-one, extended a similar benefit to the purchasers, their heirs or assigns, of all the forfeited lands which originally sold for less than fourteen dollars; if one dollar and twenty-five cents per acre had been, or should thereafter be paid.
10. But the creditor of a purchaser, has no legal or equitable right, to insist on the gratuity bestowed in the act.
11. A widow is not entitled to dower, of lands once purchased of the United States, but which have been subsequently forfeited.

Error to the Circuit court of Madison.

Petition for dower, tried before *Lane, J.*

The plaintiff instituted proceedings in the Circuit court of Madison county, praying that dower might be allotted to her in two quarter sections of land described in the petition. The court below dismissed the petition, on the ground, that the husband of the plaintiff, in his life time, was not seized of such an estate as to vest in his widow a right of dower, and this judgment was removed to this court by writ of error.

The title to each quarter section was similar, and may be thus stated. In February, eighteen hundred and

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eighteen, one Samuel Dickson, purchased the lands from the United States, paid one fourth part of the purchase money, and received a credit for the other three fourths, under the then existing laws. Certificates of the purchase were issued to him in the usual form, which he transferred by endorsement, to William A. Rogers, the husband of the plaintiff. Rogers died in the year eighteen hundred and twenty, then being in possession of the lands, and holding the certificates of purchase issued to Dickson. One Weeden administered on his estate, and as administrator, claimed for the estate of his intestate, the benefit of the further credit allowed by the act of Congress of the second of March, eighteen hundred and twenty-one, under the provisions of which, he surrendered the certificates of purchase issued to Dickson, and received from the proper officer, others of further credit, which he afterwards sold and transferred to one Amos Johnson, under an authority supposed to be given by a private act of the legislature of this State. After several intermediate assignments, these certificates came to the possession of the defendant Rawlings in October, eighteen hundred and twenty-eight, who afterwards obtained patents, which were issued in his name, as the assignee of Dickson. No payment was ever made on the lands, except the one fourth paid by Dickson, at the time of the purchase, and Rawlings became entitled to patents, under acts of Congress of the thirty-first of March, eighteen hundred and thirty, and the twenty-fifth of February, eighteen hundred and thirty-one.

The counsel for the plaintiff insisted—

1. That the estate vested in Rogers, was of such a nature as to entitle his widow to dower.

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2. That her title was not divested by the sale of the lands made by Weeden, under the private act of the legislature. And

3. That notwithstanding the forfeiture of the lands, because of the non payment of the purchase money, and their consequent reversion to the United States, she was re-vested with her original title and estate, by virtue of the acts of Congress of eighteen hundred and thirty, and eighteen hundred and thirty-one, and thus became entitled to demand dower in the lands sued for.

Robinson, for the plaintiff in error.

Hopkins, contra.

GOLDTHWAITE, J.—It will not be necessary, in this case, to examine the first two positions assumed, as the conclusion to which we have arrived on the third, is in our opinion decisive of the claim.

The act of Congress of the tenth of May, eighteen hundred, prescribing the terms and conditions on which the sales of the public lands of the United States should be made, was in force at the time of the purchase made by Dickson, and these lands were consequently within its provisions, as they were but partially paid for. By the terms of this act, a forfeiture did not accrue immediately on the failure to pay within the period of time for which a delay of payment was given. The lands did not absolutely revert to the United States, until after having been offered for sale in a particular manner specified by the act. I am not aware that any effort was ever made to forfeit any lands under the provisions of the act of

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eighteen hundred, and perhaps it was never contemplated that the provisions of this act could be changed, so as to affect a purchaser without his assent to the modification of his contract. Be this as it may, it cannot be doubted that the contract could be modified with the assent of the purchaser or his legal representatives. The act of the second of March, eighteen hundred and twenty-one, was a proposal on the part of the United States, to extend the term of payment for many years, and required of the party accepting this extension, to sign a declaration in writing, of his assent to the provisions of this act, one of which declared the land on which the further credit is taken, shall be *ipso facto* forfeited to the United States, if the payments were not made within three months after the day appointed for the payment of the last instalment, which became due on the thirtieth of September, eighteen hundred and twenty-eight. No mode is pointed out by this act, by which the representatives of a deceased purchaser, or assignee of a purchaser, might avail themselves of its benefits. The Legislature of Alabama, by its act of the fourteenth of June, eighteen hundred and twenty-one, (Laws of Ala. 344,) invested the executor or administrator of the decedent, with authority to claim the benefits of this act of Congress, on behalf of the estates which were represented by them. Acting under the authority conferred in this manner, Weeden, the administrator of Rogers, in behalf of his estate, claimed the further credit, and surrendered the certificates of purchase which had been transferred by Dickson; and certificates of further credit, under the act of Congress, were issued. Thus the contract of Dick-

son with the United States, under the act of Congress of the tenth of May, eighteen hundred, was modified, and a new contract entered into, to be governed and controlled by the act of the second of March, eighteen hundred and twenty-one.

All the acts of Congress for the relief of the purchasers of the public lands, expired on the fourth day of July, eighteen hundred and twenty-nine, until which time they had been continued by several other acts of Congress; and after giving the utmost latitude to their terms, it will be seen that all lands sold on credit, and not paid for on the fourth day of October, eighteen hundred and twenty-nine, on that day reverted to the United States, and every interest of a purchaser, or derived from him, was at an end. It has hitherto been settled by decisions of this court, that the forfeiture under these and similar acts, requires no act of entry on the part of the United States, to make it complete and effectual—(Gill vs. Taylor, 3 Porter's R. 182; Kennedy & Moreland vs. McCartney, 4 Porter's R. 141.)

As all the estate of Dickson, or those claiming under him, was thus forfeited in eighteen hundred and twenty-nine, it would not be necessary to make any further examination of this case, if it was not supposed that the previous estate of Rogers, and consequently his widow's right of dower, was revived by the acts of Congress of eighteen hundred and thirty, and eighteen hundred and thirty-one.

The first of these was passed the thirty-first of March, eighteen hundred and thirty, and directs that all purchasers, their heirs or assignees, of lands forfeited, shall

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have a right of pre-emption of the same lands, until the fourth day of July, eighteen hundred and thirty-one, upon their paying into the proper office, the sum per acre, which shall, at the time of payment, be the minimum price per acre, of the public lands of the United States, in addition to the amount heretofore paid thereon and forfeited; *provided*, that the price, including what has already been paid, and the amount to be paid, shall not exceed three dollars and fifty cents per acre.

One of the quarter sections of land having been purchased at a sum exceeding fourteen dollars per acre, more than three dollars and fifty cents was paid by Dickson at the time when the purchase was made, and consequently his heirs or assignees became entitled to a patent, without their paying any more money. The act of the twenty-fifth of February, eighteen hundred and thirty-one, extended a similar benefit to the purchasers, their heirs or assignees, of all the forfeited lands which originally sold for less than fourteen dollars, if one dollar and twenty-five cents per acre, had been, or should thereafter be paid. Under this last act, the heir or assignee of Dickson became entitled to a patent for the other quarter section, as more than that sum was paid by him at the time of the purchase.

It is obvious, from the terms used by this act, that it was contemplated to bestow a benefit on the purchaser, his heir or assignee, and it must be considered as a mere gratuity on the part of the United States, to those individuals who were considered as the most fit and proper subjects to receive the donation or benefit. It could not be contended, with any propriety, that a creditor of a

purchaser would have any legal or equitable right to insist on this gratuity. If the case could be supposed, of one dying embarrassed with debt, the claim of the creditor, however morally just, could not be permitted to divest the heir of the purchaser, of the bounty conferred on him by the munificence of the government. In legislating on such a subject, the respective claims of creditors, widows and heirs, might well be considered and apportioned, but it is not for a court, in giving a construction to a statute, to depart from the plain and obvious intention of those who framed it, in order to substitute its own views of justice and equity, in the place of the clear and manifest directions of the law.

As we have arrived at the conclusion, that the land was *ipso facto* forfeited to the United States in eighteen hundred and twenty-nine, by the omission to pay the extended debt, and that the widow can claim nothing under the subsequent acts of Congress, it is not necessary to investigate any question which may be supposed to exist between the defendant, Rawlings, as the purchaser under the sale made by Weeden, and the heirs of Rogers, as it cannot in any manner affect the present claim.

Let the judgment be affirmed.

Hitchcock et al. vs. Lukens & Son.

HITCHCOCK et al. vs. LUKENS & SON.

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1. To authorise a party to recover upon a count in the declaration, alleging a special contract, it is necessary to shew a contract substantially as alleged.
2. But it is competent for a plaintiff, where no special contract is proved, if he have a good cause of action, to recover either in a general *indebitatus assumpsit*, *quantum meruit*, or *quantum valebant*, as the proof may warrant.
3. Where one man has money in his hands, which *ex equo et bono* belongs to another, if there be no contract, modifying or controlling the general liability to pay, the person entitled to the money may recover in an action for *money had and received* to his use.
4. Nor is it necessary that there should have been any agreement between the parties, to entitle the plaintiff to maintain this action—for the law creates the privity and the promise.
5. If money be given to one person to deliver to a third, the right to the money is transferred to the latter, and he may maintain action.
6. Nor does the statute of frauds interpose a barrier to a recovery in such a case—as the undertaking is not to answer for the debt, default, or miscarriage of another, but to pay the money of another *already received*, or *when received*, to a third person.
7. Where the execution of a trust creates a mere monied demand upon the trustee for a sum certain, or which may be reduced to a certainty by a reference to something else, there is no principle of law which renders necessary a resort to equity.
8. If a contract under seal be so executed, as not to authorise a party injured by its breach to sue upon it, he may bring *assumpsit*, and make the contract, inducement by his declaration, or give it in evidence, without noticing it in the pleadings.

Error to the Circuit court of Mobile.

This was an action of *assumpsit*, by Lukens & Son, against Hitchcock & Williams.

The declaration contained two counts—one special, and one common count, for money had and received.

The special count alleged, that in consideration that the plaintiffs would relinquish their lien, acquired by execution, on a judgment against George Davis, on certain property of Davis, that the defendants promised, that as soon as the defendants should sell said property, as joint trustees of Davis, they would pay the plaintiffs. That in consideration thereof, the plaintiffs did relinquish their lien. That the defendants, as joint trustees, and for the benefit of plaintiffs, did sell said property, and received two thousand dollars, whereby they became liable—and upon this, a *super se assumpsit* was laid.

The defendants pleaded *non-assumpsit* and the statute of frauds, in which issue was joined.

There was a verdict for the plaintiffs, and a bill of exceptions taken by the defendants on the trial.

The plaintiffs gave in evidence a deed of trust under seal, signed by George Davis and by the defendants only. The deed recited, that divers judgments (twelve) had been rendered against George Davis, (amounting, besides costs, to two thousand nine hundred dollars;) that executions on those judgments had been levied on a steam-boat, fourteen horses, carriages, &c.; that the creditors had consented to extend the time of payment till the first of April: provided, all the property described could be secured, and held subject to the payment of the judgments

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according to their priority; the trustees (the defendants) were to sell the property and pay the judgments, by the first of April. It was specially provided, that the defendants were not to be responsible for any loss or injury to the property.

The plaintiffs also gave in evidence, that they had directed the sheriff not to proceed any further in their execution; but it was not shewn, nor the return on it. They offered evidence to shew that their execution had precedence over the others, except as to one for two hundred dollars. They also offered evidence, conducing to prove, that the defendants had sold a considerable portion of their property, and that they had received about eighteen hundred dollars; and also proved a demand of the defendants of payment.

The court refused to instruct the jury, that it was necessary that the plaintiffs should prove the execution and return, to shew that it was unsatisfied: also, that the contract being under seal, that the plaintiffs could not recover: also, that to recover on the first count, they must prove a special contract as therein declared on—and that if the contract proved was variant, they could not recover on that count: also, that if no other contract had been made by the defendants than the deed of trust, it was not sufficient to charge them under the first count: also, that the deed did not furnish sufficient evidence of consideration, necessary to support the first count: and charged that the waiver of lien of execution, by the plaintiffs, as averred by the deed, was a sufficient consideration to support the promise in favor of the plaintiffs: also, that if the money was received by the defendants, as

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trustees only, that they could not be sued for it by the plaintiffs at law: and charged, that if the jury believed the defendants had made the money under the deed, that the plaintiffs' execution had a precedent lien, and that there was a surplus after all expenses, and that for such a surplus, an action at law could be maintained.

The defendants gave in evidence, a judgment recovered against them (for the loss of a negro killed on the steam boat) for one thousand dollars. They offered also evidence to prove, that they had employed a captain to manage the steam boat; that this employment was judiciously made, and that it was the captain's neglect, and not theirs, which was the cause of the recovery against them. This last evidence the court rejected.*

The defendants requested the court to charge, that if the payment of the judgment of one thousand dollars, exhausted the money in their hands, that the plaintiffs were not entitled to recover.

The court did charge, that if over and above the amount of said recovery and their compensation, defendants had received enough money to pay the plaintiffs, that the recovery against them for negligence should not effect them; but if, not enough, that the plaintiffs demand, if proved according to the construction of the deed, had precedence over the amount of that recovery against them. All which was excepted to and relied on as error.

Thornton, for plaintiffs in error.

COLLIER, C. J.—To authorise a party to recover upon a contract in the declaration, alleging a special contract,

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It is necessary to show a contract substantially as alleged. But it is competent for a plaintiff, where no special contract is proved, if he have a good cause of action, to recover, either, in a general *idebitatus assumpsit*, *quantum meruit*, or *quantum valebant*, as the proof may warrant. In the present case, we are not informed by the record that there was an express contract between the parties, either special or otherwise; we will then enquire if there was any objection to a recovery upon the second count, *for money had and received*.

Where one man has money in his hands, which *ex tequo et bono* belongs to another, if there be no contract modifying or controlling the general liability to pay, the person entitled to the money may recover in an action for *money had and received* to his use. Nor is it necessary that there should have been any agreement between the parties, to entitle the plaintiffs to maintain this action. In Neilson vs. Blight, (1 Johns. Cases, 205,) it was decided, that where an agent receives goods, on condition to pay a creditor of the principal, (who is ignorant of the arrangement,) a sum of money out of the proceeds, and the goods are sold, the creditor may maintain an action for money had and received against the agent.

In Hall vs. Marston, (17 Mass. R. 575,) it appeared that one Bradford was indebted to the plaintiff and to the defendant, in the sum of thirteen hundred dollars, and remitted to the latter a bill of exchange, with these instructions: "Please to do the needful with the bill, and when in cash, have the goodness to pay Mr. Jacob Hall, distiller, Boston, two hundred dollars, and take his receipt,

and place the balance to my credit, and you will much oblige," &c.

The bill was accepted and paid, but the defendant did not pay any part of it to the plaintiff. And this action was brought to recover the *two hundred dollars*. The court considered it as well settled, that if one man promises another, for a valuable consideration, to pay a third a sum of money, the latter may maintain *assumpsit* for money had and received. It is further said, that there are many cases in which that form of action is supported, without any other privity between the parties, than what the law creates. "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right; if he cannot show that he has the legal or equitable ground for retaining it, the law creates the privity and the promise." So, if money be given to one person to deliver to a third, the right to the money is transferred to the latter, and he may bring this action—(To the s. p. *Dumond vs. Carpenter*, 3 Johns. R. 183; *Raymond vs. Bearnard*, 12 John. R. 276; *Goodridge et al. vs. Lord*, 10 Mass. R. 487; *Tindlay vs. Adams*, 2 Day's R. 369; 7 Har. & Johns. R. 157; *Williams vs. Everit*, 14 East's R. 582; 1 Com. Dig. *Assumpsit*, E.) The statute of frauds interposes no barrier to a recovery in such a case—the undertaking of a defendant is not to answer for the debt, default, or miscarriage of another, but to pay the money of another *already received*, or *when received*, to a third person. It is an agreement to perform an agency, and the reception of the money creates a sufficient consideration to support it.

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The idea, that if the plaintiffs received the money sought to be recovered of them by the sale of property, conveyed to them *in trust*, to sell for the defendants benefit, they are not chargeable at law, is not well founded. Trustees, if faithless or perverse, may be compelled, in equity, *to execute their trust*, or they may be required to discover *how they have executed it, and account to their cestui's que trust*. But where the execution of the trust creates a mere monied demand upon the trustee for a sum certain, or which may be reduced to a certainty by a reference to something else, there is no principle of law which would render necessary a resort to equity. In the case at bar, it appears from the *deed of trust*, that the defendant was an execution creditor of one Davis, who being desirous of paying him, as well as others, who had executions against his estate, conveyed a considerable amount of personal property to the plaintiffs, *in trust*, to sell, and with the proceeds to pay the execution creditors according to their legal priority or preference. The plaintiffs sold a part or all the property, which yielded largely more than a sum sufficient to satisfy the execution of the defendants, or any other having a prior lien. It is, then, clear, that the plaintiffs have money in their hands, which *ex æquo et bono* should be paid over to the defendants.

To entitle the defendants to recover, there could have been no necessity for producing their execution, for any other purpose than to show its amount, and the time of its issuance by the clerk, and reception by the sheriff; and its production might be dispensed with, and the *execution docket* substituted to prove these facts, if the she-

riff had failed to return it to the proper depository according to its mandate.

The *deed of trust* recites the agreement by the execution creditors, to delay a collection of their judgments until the first day of April after its execution, upon the property conveyed by the deed, being secured for their benefit. Now, it was not necessary to the maintenance of the defendants action, to show that they had caused the sheriff to withdraw the levy of their execution, and return it unsatisfied. If the defendants had, in despite of the agreement recited in the deed, collected their judgment, it would have been an available defence, which it was incumbent on the plaintiffs to make out. But the defendants did show, *prima facie*, that they did not commit a breach of the agreement, for they directed the sheriff to suspend proceedings upon the execution.

It is argued for the plaintiffs, that conceding their liability, yet they are not chargeable in *assumpsit*; that their contract being, under seal, some other action suited to its dignity, should have been brought. This argument would be very forcible, if the defendants were parties to the deed; but they are not, and consequently can maintain no action upon it. If a contract under seal, be so executed as not to authorise a party injured by its breach, to sue upon it, he may bring *assumpsit*, and make the contract inducement by his declaration, or give it in evidence, without noticing it in the pleadings, according as it may be necessary to make out his case—(*Gouverneur et al. vs. Elliott and wife*, 2 Hall's Rep. 211.) In *Arnold vs. Hickman*, (6 Munf. R. 15,) it was determined, that where a judgment assigned by a *sealed instrument* was

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afterwards reversed, *assumpsit* was the proper action against the assignor; because the deed of assignment was not the *ground*, but only *inducement* to the action. And in *Baird & Briggs vs. Blagrove's ex'or*, (1 Wash. R. 170,) an action of *assumpsit* was brought upon a state of facts, in some respects not much unlike those shown in the present case. There, the declaration stated, that the plaintiffs having obtained a judgment against one Jeremiah Glenn, and being willing to give to him an opportunity of disposing of his property to the best advantage, to enable him to satisfy the judgment, an agreement was entered into between the plaintiffs, Glenn, and the testator of the defendant, whereby the testator bound himself to see the balance of the debt, interest and cost, (which should remain unsatisfied by the property which Glenn might sell for that purpose,) paid by October, seventeen hundred and seventy-five. That the intention of the agreement was to favor Glenn, by enabling him to sell his property at the highest price. That in consideration thereof, the testator afterwards, &c. assumed upon himself to pay such balance when required. The declaration then avers, that a sale was made, and a balance still remained unsatisfied, of which, &c. whereby, &c. nevertheless, &c. The agreement stated in the declaration had three *scrolls*, one opposite each signature: but no part of the agreement, either in the beginning, conclusion, or attestation, says any thing about its being sealed. The court inclined to the opinion, that the agreement was not a sealed instrument, but without deciding that point, were of opinion that if it was, the action was sustainable. "The agreement," say they, "is

only stated as inducement to that, which forms the real ground of the consideration"—(See also *Brickell vs. Batchelor, C. & N.* (No. Caro.) Rep. 109.)

In the case before us, the deed of assignment gave no right of action to the defendants. The foundation of their action, is the receipt of money by the sale of Davis' property; the deed is but inducement to this, and serves to show from whom, and for what purpose the property was conveyed to the plaintiffs, and how its proceeds were to be appropriated.

There is no error in the charge of the judge to the jury, *that the plaintiffs were not authorised to retain as against the creditors provided for by the deed, the amount of a recovery against them, for the loss of a negro by negligence on the steam boat, conveyed to them by Davis*, if we are to understand the negligence to be imputable to the plaintiffs. It is, however, needless to consider this point, as it seems to have been very clearly proved at the trial, that even allowing the plaintiffs to retain to the extent of the recovery against them, and they would still have in their hands a sum, much more than sufficient to pay the amount of the defendants judgment, liable (according to the terms of the deed) to its satisfaction.

The proceedings below are free from objection, and the judgment must be affirmed.

Driver vs. Riddle.

DRIVER vs. RIDDLE.

1. At common law, when administration was revoked pending a suit, the revocation might be pleaded in discharge of the action, but it was necessary for the plea to allege an administration of the effects, or that they had been delivered to the succeeding administrator.
2. An executor cannot avoid his liability to settlement of the estate of his testator in the Orphan's court, by resignation.
3. The act of eighteen hundred and twenty-one, (Aik. Dig. 179,) authorises an administrator to resign his authority, but provides that he and his securities shall continue bound for all assets not duly administered, or delivered to his successor.
4. An administrator or executor, therefore, cannot by a resignation of his authority, avoid any of the liabilities imposed on him by law,—and he can only be discharged from an action, by shewing an administration or want of assets.

Error to the County court of Jackson county.

Assumpsit against an administrator.

On the trial of the cause, defendant suggested, that since the last term, he had resigned his administration, and that one Riddle, as sheriff of the county, had been appointed, which appeared to the court to be true, and matter of record in the Orphan's court. Whereupon, defendant moved to be discharged from the suit, and he was accordingly discharged.

Plaintiff then informed the court, he would not move to revive the suit against Riddle, as the present administrator; upon which, Riddle moved to be made defendant, as administrator *de bonis non*, which was accordingly done. Riddle then declared he was ready for trial, and

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plaintiff refusing to proceed against him, the court nonsuited plaintiff.

Assignments of error:

1. The court erred in discharging the administrator, as defendant, from the suit;
2. In substituting Riddle as defendant; and
3. In rendering judgment against plaintiff below.

Parsons, for the plaintiff in error.

GOLDTHWAITE, J.—The sole question which arises in this case, is, whether an administrator, by a resignation of his office, can discharge himself from a suit in progress against him, without shewing an administration or the want of assets?

The act of eighteen hundred and twenty-one, (Aik. Dig. 179,) authorises an administrator to resign his authority, but expressly provides that he and his securities shall continue bound for all assets which have not been duly administered, or delivered to the succeeding administrator. Such was the liability at common law, in cases where the administration was revoked pending the suit, and although the revocation might be pleaded in discharge of the action, it was necessary for the plea to allege an administration of the effects, or that they had been delivered to the succeeding administrator—(*Garter vs. Dee*, Freeman, 13; 1 Saund. Pl. and Ev. 373.) This court also has decided that an executor could not avoid his liability to settlement of the estate of his testator before the Orphan's court by a resignation—(*Thomason & Haynes vs. Blackwell*, 5 Stew. & Por. 181.) Those au-

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thorities are satisfactory to shew that no administrator or executor can, by resignation of his authority, avoid any liabilities imposed on him by law ; and that he can only be discharged by shewing an administration or want of assets.

In the case before us, no attempt was made, by the previous administrator, to shew what disposition had been made of the assets which came to his hands,—and as the plaintiff has the right to pursue them, and, if necessary, to fix a personal responsibility on the administrator or his securities, if he has wasted the assets of the estate, it was incumbent on the administrator to aver in his suggestion to the court, such facts as were sufficient to discharge himself. It is immaterial whether these facts appear by suggestion to the court, or by plea; as in either event, the plaintiff ought to have the opportunity to controvert them by issue. As no opportunity has been afforded him to test the right of the administrator to be discharged from liability, the court erred in discharging the previous administrator, and permitting the present defendant to become a party to the suit.

Let the judgment be reversed, and the cause remanded for further proceedings.

EVANS vs. Gordon.

EVANS vs. GORDON.

1. Notes payable in bank are governed by the law merchant.
2. And on such paper, it is not necessary to sue the maker to insolvency, in order to enable the holder to maintain a suit against the endorser—*aliter*, where the note is not payable in bank.
3. Where the consideration of the note, is effects, which belonged to an estate of which the plaintiff is executor, the contract is considered as made with the *individual*, and he need not declare in his *representative* character in a suit on the contract.
4. Where a negotiable note is endorsed immediately to a plaintiff, suit may be brought by him on such endorsement against the endorser, without disclosing that he received it as an executor.

Error to the County court of Wilcox county.

Assumpsit against the endorser of a promissory note.

This action was brought upon a note endorsed by the plaintiff in error, which note was payable to the order of Thomas Evans, negotiable and payable at the Branch Bank at Mobile, and endorsed by said Thomas Evans.

The declaration averred, demand and protest, and the pleas were—

1. *Non-assumpsit*.
2. That the note was not the property of the plaintiff, in his individual capacity.

Verdict and judgment for plaintiff below.

On the trial of the cause, plaintiff proved that the note was given for property which belonged to the estate of one Alexander Gordon, deceased, of whose estate plain-

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plaintiff was executor. There was no proof that the maker of the note had been sued to insolvency in any court of record.

Defendant moved the court to instruct the jury, that they could not find a verdict for plaintiff, inasmuch as the suit was not brought by plaintiff in his representative character, and as it was not shewn that the maker of the note had been sued to insolvency, before the commencement of the suit against defendant. But the court instructed the jury, that if they believed the property was not entirely in plaintiff, they could find for him, and it was not necessary, that it should be shewn that the maker of the note had been sued to insolvency, before suit commenced against defendant, in order to entitle plaintiff to a verdict. Defendant objected to the protest offered in evidence going to the jury, which objection was overruled by the court.

It was here assigned as error :

That the court erred, in refusing to give, and in giving the several charges to the jury, stated in the bill of exceptions.

Porter, for the plaintiff in error.

Phillips, contra.

PER CURIAM.—The note sued on, being payable in bank, is by statute governed by the rules of the law merchant—(Aik. Dig. 329, s. 11.)

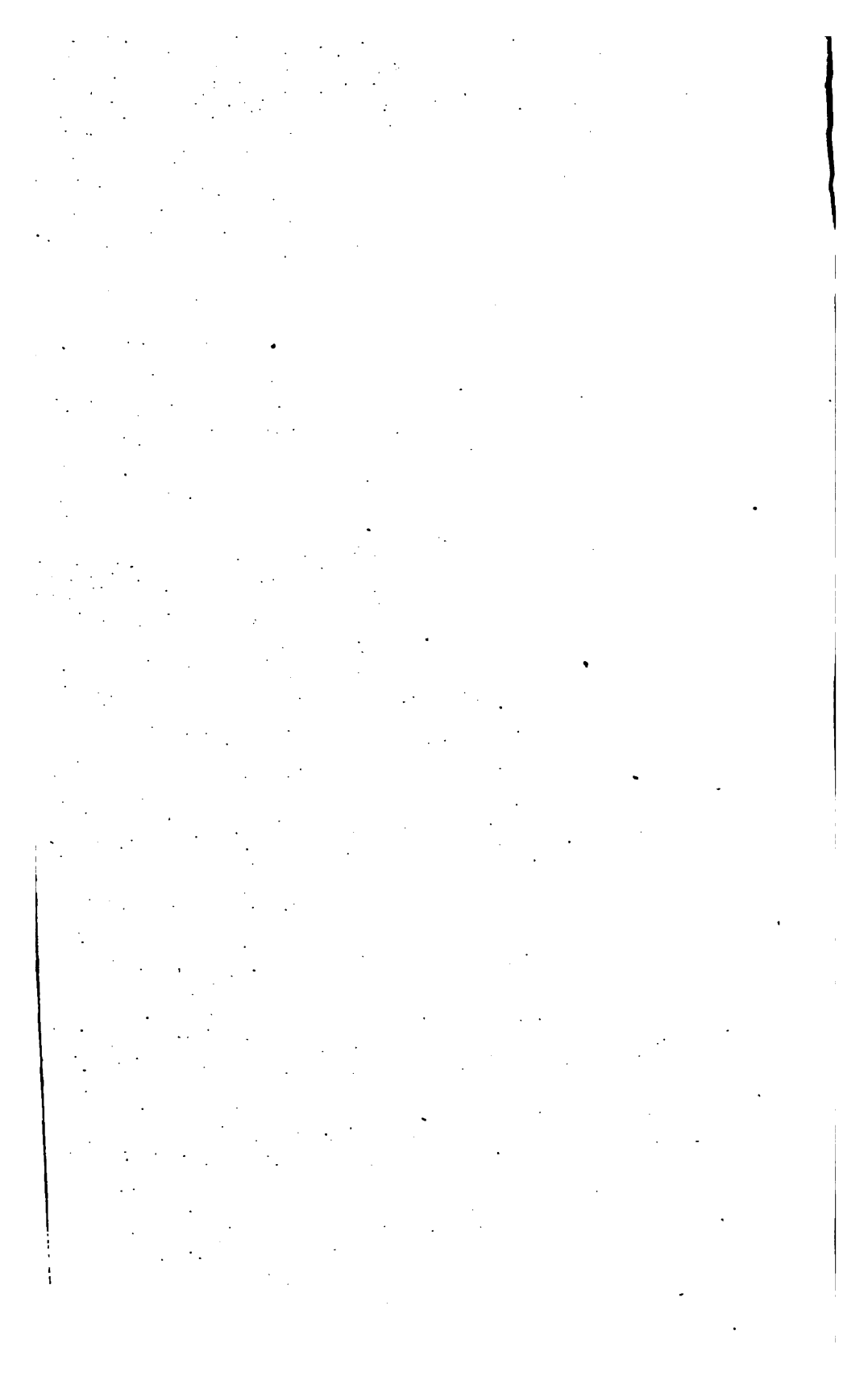
It was not necessary to sue the maker to insolvency, in order to enable the holder to maintain a suit against the endorser, as is required by the same statute, when the note is not payable in bank.

The other objection is equally unsustainable. The consideration of the note was shewn to be property or effects belonging to the estate, of which the defendant in error was the executor; and in such a case, the contract is considered as made with the *individual*, and he need not declare in^o his *representative* capacity, in a suit on the contract—(1 Chitty's Plead, 205; 2 Williams on Ex'rs, 1149.)

Such is the rule, when the action is founded on the *contract of sale*, but in this case the note is endorsed immediately to the defendant in error, and the suit could alone be brought in the manner it is instituted.

Let the judgment be affirmed.

JANUARY TERM, 1839.



REPORTS
OF
CASES ARGUED AND DETERMINED
AT
JANUARY TERM, 1839.

ROCHELLE vs. HARRISON.

1. A husband can only be charged by the contract or admission of his wife, in consequence of some authority actually given, or necessarily implied, from the circumstances under which she acts.
2. But the circumstances under which plaintiff's property went into possession of the intestate of a defendant administratrix, may be shewn, in detinue, by proving a request from defendant to plaintiff to that effect, in the life time of her husband.
3. A contract for the sale of negroes, which is *executory*, and which is intended to defraud creditors, does not pass the title : and an action brought on the contract, by the vendee against the vendor, for the slaves, cannot be maintained.
4. The act to prevent frauds and perjuries, (Aik. Dig. 207,) avoids all gifts or conveyances in fraud of the rights of creditors—only, however, in favor of creditors and purchasers.
5. A deed is not necessary in a conveyance of personal estate ; a delivery passes title, as effectually as the most solemn instrument.
6. And such a delivery of a personal chattel, in derogation of the rights of creditors, is within the inhibition of the statute.

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7. What the law will not accord by suit, cannot be attained by fraud or force :
8. Therefore, whenever the title to property has once passed by an executed contract, it cannot be re-vested by re-capture, or any other mode of acquiring possession.
9. (In Massachusetts, a distinction is made between actual conveyances, and contracts sought to be enforced : the latter may be avoided—the former are binding.)
10. (But in New York and Ohio, conveyances void by statute, as against creditors and purchasers, are binding between the parties.)

Error to Lowndes Circuit court.

Detinue for slaves, tried by *Pickens, J.*

An action of detinue, was instituted by Harrison, against Elizabeth B. and James Rochelle, for the recovery of two negro slaves. The defendants pleaded the general issue; and at the trial, a verdict was returned in favor of the plaintiff, against Elizabeth B., and in favor of the other defendant; on which judgment was rendered.

The plaintiff claimed title to the slaves, by shewing a written agreement between himself and one George Rochelle, the husband of the defendant, Elizabeth, executed in April, eighteen hundred and thirty-two, by which Rochelle admitted that Harrison was seized and possessed of the slaves sued for, with others, and hired the same of him until the first day of January, eighteen hundred and thirty-three. By another writing, dated in December, eighteen hundred and thirty-three, signed by the said Rochelle, it appeared that he then again hired the same slaves; but no time of hiring was therein specified.

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The plaintiff proved by one Neal, that he was employed as his overseer, and put on the plantation where Rochelle lived, in January, eighteen hundred and thirty-five; and that all the slaves on the plantation were put under his charge. That the slaves sued for, were too small to work in the field, and they remained in the house, waiting on Rochelle's family. In January, eighteen hundred and thirty-six, Rochelle removed to Lowndesborough, where he died in that year. Previous to the removal of the family of Rochelle, the defendant, Elizabeth, requested the witness to speak to Harrison, and request him to allow her to take the slaves sued for, with them, to wait on the family; and Harrison said to witness that she might do so, as they were too small to work in the field.

The defendants objected to the admission of the declarations, either of Mrs. Rochelle or of Harrison, as forming no part of the *res gesta*—but the court admitted the evidence.

After proof of the value of the slaves, and a demand of them, and refusal to deliver, the plaintiff closed his evidence.

The defendants then gave in evidence, that all the slaves mentioned in the agreement for the hiring, had once belonged to George Rochelle; and offered evidence conducing to show, that if any sale was ever made by him to Harrison of the slaves in question, it was with an intent to defraud creditors of said Rochelle; and moved the court to instruct the jury, that if the sale was made with such intent, Harrison, not having possession of the slaves, could not recover under such fraudulent sale.

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and purchase. This charge was refused, and the jury were instructed, that even if such sale was fraudulent as to creditors, yet the plaintiff could recover against the defendant; she being the administratrix of said Rochelle, but being neither creditor nor purchaser.

The admission of the evidence, the refusal to charge as requested, and the charge as given, were excepted to, and a bill of exceptions signed. A writ of error was sued out, and the judgment sought to be reversed, on the supposed errors stated in the exceptions.

Williams, for plaintiff in error.

Williams, for plaintiff in error, to show that the admissions of defendant ought not to have been received, cited 2 Nott & McCord, 374; 7 Term Rep. 112; 3 Munford's R. 29; Wharton's Dig. 249; 5 Conn. Rep. 93; 2 Starkie on Ev. 400, top and bottom; 6 East. R. 192; 1 Term R. 69; 1 Burr. 635; 2 Ch. Cases, 69; Bull. N. P. 286.

To support the other points—12 Wheat. 567; 8 Cranch. 72; 11 Wheat. 209.

To shew that the plaintiff was not entitled to recover on the ground of the fraudulent intention towards creditors, he cited—4 Peters' R. 184; Case from Hill's So. Ca. Rep. Gaston, adm'r vs. Ballard; 3 Cranch, 307, 242; 5 Cranch, 363; Aik. Dig. 207.

GOLDTHWAITE, J.—It is insisted, that the evidence admitted by the Circuit court, of the request made of Harrison by Mrs. Rochelle, and his answer ought to have

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been excluded, as the admission of a *feme covert* is not evidence to charge the husband or his estate, unless made at a time when acting under his authority as an agent. The rule is unquestionable, that the husband can only be charged by the wife, in consequence of some authority actually given, or necessarily implied, from the circumstances under which she acts—(Hawkins vs. Hatten, 2 Nott & McCord, 374; Denn vs. White et ux. 7 Term. R. 112; Sheppard vs. Starke and wife, 3 Munf. 29; Aveson vs. Ld. Kinnaird, 6 East, 192.)

But the application of this rule to the present case is not perceived. The attempt is not made by this action, to charge the husband or his estate, in consequence of any admission by the wife. The question at issue was one relating to the title to the slaves. No title whatever in the husband had been disclosed when this evidence was offered and excepted to; but, on the contrary, a written contract made with the husband for the hire of the slaves in eighteen hundred and thirty-two and eighteen hundred and thirty-three, was in evidence. The plaintiff might have deemed it important, as it was certainly competent for him, to shew, in what manner the slaves were permitted to depart from the plantation occupied by his overseer in eighteen hundred and thirty-five; and for this purpose it was proper for him to shew a request made of him by Mrs. Rochelle, which he complied with. If the action had been instituted against Rochelle in his life-time, such evidence would have been admissible, not as evidence of title, but as shewing the *quo animo* under which he parted with the possession, or as a reason why possession was not then taken. It was, in fact, nothing

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more than an explanation of the circumstances connected with the removal of the slaves.

The question arising out of the exception to the instructions given to the jury, is one of more importance, if not of more intrinsic difficulty. The evidence subsequently introduced, was probably of a character calculated to shew that Rochelle, in his life-time, had sold the slaves to Harrison, under circumstances calculated and intended to defraud the creditors of Rochelle. It was evidently an *executed contract*, if we are to judge from the evidence stated in the bill of exceptions, and was not executory, or dependent on some act to be subsequently performed by either party. Possession was actually delivered; or, if not, Rochelle was estopped from denying that fact, as he acknowledges a hiring from Harrison, in eighteen hundred and thirty-two, under his hand and seal. If the contract between Harrison and Rochelle was merely executory, and not executed, no title to the slaves would have passed by it, and the action could not have been maintained. It is possible that a mere executory contract, tainted with fraud, would not be enforced by a court of justice; but it is unnecessary now to decide this question, it not being presented in this cause. Considering the sale as an executed contract, it is directly within the terms of the second section of the act to prevent frauds and perjuries—which avoids every gift, grant, or conveyance of lands, tenements and hereditaments, goods or chattels, made to delay, hinder or defraud creditors or purchasers; but avoids it only in favor of creditors and purchasers—(Aik. Dig. 207.) It is not necessary to a conveyance of the title of personal estate, that it

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should be by deed; a mere delivery is as effectual for the purpose of passing the title, as if the property was conveyed with all the formalities usually attending the transefer of the title to real estate; and is equally within the intention and meaning of the statute.

The argument of the plaintiff in error, assumes, that when the fraudulent seller or donor, by any means recovers the possession of the property fraudulently conveyed; and his purchaser or donee is compelled to resort to an action to re-gain the property, he ought not to be aided; because he is then seeking to enforce a contract void in law, or as against public policy. Let this position be examined, and see the consequences to which it must lead. By the covinous arrangement, the creditor or purchaser is first defeated in his rights—then the seller or donor, by fraud or force, obtains possession of the property, which it is admitted he cannot re-gain by suit. If the fraudulent purchaser or donee is without redress—if his possession is violated by the seller or donor,—there is a direct temptation held out to obtain the possession, by the most violent and iniquitous means. If no suit could be maintained according to the title, as settled by the parties themselves, it would indeed resolve the rights of parties into mere questions of fraud or force; and anarchy and bloodshed must be the inevitable consequences of establishing such rules. It may be asserted, as a principle which scarce admits of exception, that what the law will not accord by suit, cannot be attained by fraud or force. Whenever the title to property has once passed by an executed contract, it can not be re-vested by recaption, or by any other mode of acquiring the possession.

It has been supposed that the case of the Executors of Gaston vs. Ballard (1 Hill, 406,) sustains the position assumed for the plaintiff in error. The facts of that case were as follow: Ballard was liable as security for a large amount, and in order to prevent certain slaves from being seized and sold to pay the debt for which he was liable, placed them in the hands of Gaston to keep for him. Gaston was to pay some of Ballard's debts, as a hire for the slaves, which were delivered to Gaston in eighteen hundred and twenty-one, and remained in his possession until eighteen hundred and thirty; when some of them run away, and came to the possession of Ballard, who immediately sold them to his son for a fair and valuable consideration. Gaston's executors sued Ballard, junior, and the court held that they were not entitled to recover.

It will be perceived, that in this case, there was no sale or gift of the slaves to Gaston;—the title was never in any manner conveyed to him, and remained in Ballard during the whole time, and he could have sued for and recovered the slaves, if the facts of the case are truly stated.

In the case of Phelps vs. Decker, (10 Mass. R. 274) it was held as the doctrine of the common law, that deeds of conveyance, or other deeds, made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful, in itself, or in consequence of any prohibitory statute,—are void *ab initio*, and may be avoided by plea; or on the general issue, *non est factum*, the illegality may be given in evidence. But in a later case, the doctrine was qualified,

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and the court took the distinction between bonds and contracts sought to be enforced, and actual conveyances of lands or other property. The former might be avoided: the latter were treated as actual transfers, and governed by the same rule as the payment of money, or the delivery of a personal chattel—(Inhabitants of Worcester vs. Eaton, 11 Mass. R. 375.)

In New York and Ohio, it has been held that conveyances, void by the statute, as against creditors and purchasers, were binding between the parties, and could not be avoided—(Anderson vs. Roberts, 18 Johns. R. 515; Burgett vs. Burgett, 1 Ohio R. 219.)

Our opinion is in accordance with these cases, and the judgment of the Circuit court is affirmed.

Curry vs. the Bank of Mobile.

CURRY vs. THE BANK OF MOBILE.

1. The office of a demurrer to evidence, is to withdraw from the jury, the consideration of the facts offered in evidence, to maintain the issue, which the jury were empaneled to try, and to refer them to the court. It is, in effect, the substitution of the court for the jury.
2. The statute authorising summary proceedings by the banks, in collecting claims due them, requires the court to empanel a jury to try the issue, where the claim is contested.
3. Where the name of one of the endorsers of a note is similar to that of the maker, a presumption that the same person is both maker and endorser is not so violent, as to amount to *prima facie* evidence of the fact. If they were the signatures of the same person, the fact might be easily proved.
4. *It seems*, that where the protest of a note states, that payment of the note was demanded at the proper time and at the proper place, and that it was protested for non-payment—it is sufficient, without stating from whom payment was demanded, or what reply was given to the demand made.
5. Where the protest states, "that the endorsers have had due notice of the demand and non-payment, and protest of said note, by notice in writing, directed by me as follows: To the endorsers," and left at their offices:—it is sufficient; and an objection that the place where the notice was left, is not described, and that the notary decides that the place is the office of the endorser, will not be sustained.
6. Notice of the dishonor of a note may be given on the same day the protest is made, and must be given on the next day, or placed in the post office, to be sent by the next mail.
7. Where a notice is sent by mail to a distant post office, the place to which the letter containing the notice is directed, must be stated in the certificate of the notary.
8. But where the parties live in the same town, and a notice is

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- left at the place of business of the endorser,—it is sufficient to describe it as the office of the person so notified.
9. The certificate of the notice by the notary, is *prima facie* evidence only of the fact recited; and if left at the wrong place, the fact may be controverted.
 10. The holder of a note or bill of exchange cannot be permitted by any act of his, to prejudice the right of any party to the instrument, to whom he looks for payment.
 11. The deliberate cancellation by the holder, of an endorsement on a note, discharges the liability of such endorser to the holder, and so operating, it will also discharge from liability to the holder, the subsequent endorser.
 12. Thus—the holder of a note or bill of exchange, seeking to effect a recovery on such note against an endorser, cannot prejudice the right of such endorser, by striking out the name of a previous endorser, who would be liable to the last.
 13. Though, *it seems*, the situation of the endorser, whose name is stricken out, might be explained—as, that he was an accommodation endorser, and not responsible to his immediate endorsee, in any event.
 14. In cases where bank debtors are proceeded against summarily by notice, the judgment, whether by default or otherwise, must shew affirmatively every fact necessary to give the court jurisdiction; and in judgments by default, the liability of the defendant for the debt must be also shewn.
 15. But where an issue is made up, the verdict ascertains the defendant's liability, as in other cases.
 16. A notice in writing, which so far identifies the debt for which judgment will be moved, as to afford reasonable certainty, is sufficient.
 17. A corporation can do an act *in pais*, by an attorney in fact; and so, an attorney, acting on behalf of a bank, may give the notice to a bank debtor, required by statute, previous to a motion for judgment.

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18. And such notice need not be under the seal of the corporation.
19. The ancient rule applied to corporations existing by the common law, that they could only act by their common seal, has no application to corporations created by statute.

Error to the Circuit court of Mobile.

Bank notice, tried before *Pickens*, J.

The following was the notice served on defendant:

"The State of Alabama, Mobile county.

"*To James Curry:*

"Whereas you are indebted to the President, Directors & Company of the Bank of Mobile, by a promissory note, and as the endorser, by the name and description of James Curry & Co., of the said note, a copy of which here follows, to wit:

"\$450.

Mobile, 10 May, 1837.

"Sixty days after date, I promise to pay Mr. A. H. Gazzam, or order, four hundred and fifty dollars, for value received, negotiable and payable at the Bank of Mobile.

S. ROULSTON."

"And whereas, the said note became due and payable on the 12th day of July, 1837, and the sum of money therein specified has not been paid according to the tenor and effect thereof; by reason whereof, said note was duly protested for non-payment.

"Now, therefore, you will take notice, that the said corporation, by their attorneys, will move for judgment against you, for the sum of money specified in said note, together with the interest thereon, and the award of execution thereon, at the present term of the Circuit court, now in session in the said county of Mobile, and on the ninth Wednesday of said term.

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"The sheriff of Mobile county will execute this notice.
Issued 18 December, 1837.

GAYLE & VANDEGRAFF, Bank Attorneys."

The notice was returned duly executed.

"I, William R. Hallet, President of the Bank of Mobile, do hereby certify, that the note, a copy of which is inserted in the foregoing notice, is now, and was at the time the same was protested for non-payment, really and *bona fide* the property of the said bank.

"Given under my hand, this 25th day of December, 1837.

WILLIAM R. HALLET, Pres't."

"And now, at this day, to wit, at a Circuit court begun and held, in and for the county of Mobile, at the court house thereof, on the second Monday after the fourth Monday of October, 1837—on Saturday, the 13th day of January, 1837, being a day of said term, the following judgment was rendered in this cause, to wit:

"Bank of Mobile *vs.* James Curry.—Debt.

"This day came the parties, by their attorneys, and the defendant, by his attorney, demurs to the evidence in this cause, which demurrer being fully heard, it is considered by the court, that the said demurrer is not sufficient to bar or preclude the plaintiffs action, and that the law is for the plaintiffs: It is therefore considered by the court, that the plaintiffs recover of the defendant, the sum of 470 dollars damages, due by the promissory note in the plaintiffs notice mentioned, together with their costs, by them about their said motion in this behalf expended.

The demurrer was as follows:

The plaintiffs moved the court for judgment in this cause, and produced to the court a note, as follows:

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" \$450.

Mobile, 10 May, 1837.

"Sixty days after date, I promise to pay Mr. A. H. Gazzam, or order, four hundred and fifty dollars, for value received, negotiable and payable at the Bank of Mobile.

S. ROULSTON."

Upon the back of said note, were the following endorsements :

"A. H. GAZZAM.

"S. ROULSTON.

"JAMES CURRY & Co.

"S. ROULSTON."

The plaintiff also produced a protest, which is as follows:

"The State of Alabama, City and County of Mobile,

"By this public instrument of protest, be it known—that on this twelfth day of July, in the year of our Lord, one thousand eight hundred and thirty-seven, at the request of the Bank of Mobile, I, Charles A. Marston, notary public, in and for the city and county of Mobile, in the State of Alabama, duly commissioned and qualified by lawful authority, did produce and present the original note, (a true copy of which is below written,) at the Bank of Mobile, and demanded payment thereof, according to the tenor and effect of said note, and received for reply from —.

"Whereupon, I, the said notary, at the request aforesaid, did make protest, and by these presents do solemnly protest, as well against the drawer thereof, as against all others, whom it doth or may concern, for all exchange, re-exchange, costs, damages, charges, interest or expences suffered, or to be suffered, for want of payment

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of the said note, being in words and figures, as follow,
to-wit:

"\$450.

Mobile, 10 May, 1837.

"Sixty days after date, I promise to pay Mr. A. H. Gazzam, or order, four hundred and fifty dollars, for value received, negotiable and payable at the Bank of Mobile.

S. ROULSTON."

Endorsed on the back—

"A. H. GAZZAM.

"S. ROULSTON.

"JAMES CURRY & Co.

"S. ROULSTON.

"And be it further known, that I, Charles A. Marston, notary aforesaid, do further certify, that the endorsers have had due notice of the demand and non-payment, and protest of said note, by notice in writing, directed by me as follows: 'To the endorsers—and left at their offices.' Thus done and protested at Mobile, on the day and year first above written.

"In testimony whereof, I have hereunto set my hand, and affixed my notarial seal, at Mobile, on the 12th day of July, in the year of our Lord, one thousand eight hundred and thirty-seven.

CHARLES A. MARSTON,

Notary Public."

[Notarial Seal.]

Upon the above proof, the plaintiffs moved the court for judgment, and produced the notice, with the certificate of the President of the Bank, endorsed thereon: whereupon the defendant objected to the rendition of the judgment, and stated to the court, that he would demur to the evidence: whereupon the plaintiffs, notwith-

standing the objection of defendant, (who denied the right of the plaintiffs to do so,) did strike out the name of S. Roulston, on the back of said note, so as to make the endorsement of said note read thus :

A. H. GAZZAM.

S. ~~ROULSTON~~

JAMES CURRY & Co.

S. ROULSTON.

And then submitted the said note, with the erasure of said endorsement.

And thereupon the said defendant prays judgment in his favor in said cause, on the proof presented to the court, because he says that the same is not sufficient in law to authorise the rendering of judgment against him, and that the defendant is not bound by the law of the land to answer the same: and this he is ready to verify—wherefore he prays judgment.

And thereupon, the said plaintiffs do aver and maintain, that the said evidence is sufficient in law to entitle them to judgment in this behalf, and they do therefore join in said demurrer, and pray that the court may render judgment for the plaintiffs in this behalf.

The plaintiffs joined in demurrer.

Gayle, for plaintiffs in error.

Stewart, contra.

ORMOND, J.—The questions of law which are made in this case, arise on a judgment obtained by the the defendant in error, against the plaintiffs in error, on motion upon what is called in the record, a demurrer to the evidence.

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The errors assigned are—

1. That the notice is not such as is required by law, being by the attorney at law of the bank, and not under the corporate seal.

2. The court erred in overruling the demurrer to the evidence.

The last assignment of error will be first considered.

It is impossible to consider the demurrer in this case, a demurrer to evidence. The office of a demurrer to evidence, is to withdraw from the jury the consideration of the facts offered in evidence, to maintain the issue which the jury were empaneled to try, and to refer them to the court. It is, in effect, the substitution of the court for the jury.

The statute under which this proceeding is had, requires the court, if the claim is contested, to empanel a jury to try the issue between the parties. But in this case, it does not appear from the record, that any issue was tendered, or that a jury was empaneled. There could not, therefore, be a demurrer to the evidence.

As, however, the act upon which this proceeding was had, authorised the court to render judgment without the intervention of a jury, we may consider the statement of facts which appears in the record, as an agreement of record of the facts upon which the judgment of the court was pronounced, and thus give effect to what appears to have been the intention of the parties, by what is called in the record, a demurrer to evidence.

The facts thus set out, are the note on which the motion is founded, with the endorsements thereon, and the protest of the notary for the non-payment of the note.

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The record then proceeds to state, that "upon the above proof, the plaintiff moved the court for judgment, and produced the notice, with the certificate of the president of the bank endorsed thereon." It further appears, that the court permitted the plaintiffs below to strike out the endorsement of S. Roulston, it being the second endorsement, and preceding that of the defendant below, though objected to by him.

The sufficiency of this evidence to maintain the action, and also the right of the plaintiffs below to strike out an endorsement previous to that of the plaintiffs in error, will now be considered.

The note on which the motion is founded, is made by S. Roulston, and is payable to the order of A. H. Gazzam. It appears to have been endorsed by A. H. Gazzam, S. Roulston, James Curry & Co. and S. Roulston.

It is insisted by the plaintiffs' counsel, that S. Roulston, the endorser, is the same person as S. Roulston, the maker; that therefore, the note, after having been put in circulation by the endorsement of Gazzam, must have become the property of Roulston, the maker; which he contends was in law an extinguishment, and that the note could not afterwards be put in circulation.

The only evidence that this assumption is correct, is the similarity of the two names, and we do not think this of itself sufficient. It might certainly lead to a suspicion, that the two names indicated the same person, but it does not, in our opinion, amount to such a violent presumption, as to be *prima facie* evidence of the fact. It is also open to the objection, that it is not the best evidence in the power of the party to adduce. If they be

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In fact, the signature of the same person, nothing could have been easier than to have proved it beyond doubt; whereas, in the aspect in which the question is now presented, the only evidence of their being the signature of the same person, is, that the two names are spelled alike. Such remote analogies are too uncertain to be the foundation of a judgment, especially in a case where better evidence could have been had.

The objection, therefore, that the note was extinguished, by becoming the property of the maker, and that it could not again be put in circulation, does not arise in this case; and for that reason we refrain from expressing any opinion on that question, as also because we are informed that this point will directly arise in other cases now pending.

It is also contended by the plaintiffs' counsel, that the protest does not state from whom payment was demanded, nor what was the reply to the demand made; and that for that reason, it is insufficient. The protest states, that payment of the note was demanded at the proper time and at the proper place, and that it was protested for non-payment, which could not have been done, if the payment had not been refused, or neglected to be made.

It is also insisted, that the certificate of the notary, that he had given notice to the other parties to the note, is insufficient. The certificate is in these words: "I, Charles A. Marston, notary as aforesaid, do further certify, that the endorsers have had due notice of the demand and non-payment, and protest of said note, by notice in writing, directed by me as follows: 'To the endorsers—and left at their offices.'" It is supposed, that the notice be-

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ing given on the day the note was protested, was given too soon; but it is well settled, that notice of the dishonor of a note may be given on the same day the protest is made, and must be given on the next day, or placed in the post office, to be sent by the next mail, in the ordinary course of business.

The language used by the notary, in setting forth that he had given notice to the endorsers, has also been objected to; but we do not think it obnoxious to the criticism which has been made on it. He says that he gave notice in writing, of the demand, non-payment and protest, to the endorsers, "*and left at their offices.*" It is objected, that he should have described the place where the notices were left, without undertaking to decide whether the place was the office of the person so notified or not.

If the notice had been sent by mail to a distant post office, it would certainly have been necessary for the notary to have stated the place to which the letter, containing the notice, was directed. But where, as in this case, the parties living in the same town, a notice is left at the place of business of the individual, it is sufficient to describe it as the office of the person so notified.

The certificate of the notice which the notary is authorised to make, was designed by the statute to be *prima facie* evidence only of the fact recited; and if the notary leave the notice at the wrong place, the fact may be controverted, notwithstanding he may have certified that it was properly left. There is, therefore, no objection to the protest.

The court below permitted the defendant in error to **strike out the name of the second endorser**, (S. Roulston,) though objected to by the plaintiff in error.

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In this, the court erred. The holder of a note or bill of exchange, cannot be permitted by any act of his, to prejudice the right of any party to the instrument, to whom he looks for payment. If a recovery could be had on this note, against the plaintiff in error, as endorser, he would have a right of action against his immediate endorser; and it is very clear, that the holder cannot impair or abridge this right. The holder has property in the note, and dominion over it, and may release any or all the parties to it; but he cannot be allowed to exercise this privilege, to the prejudice of another's right. The same rule which obtains in favor of a surety, when the creditor, by arrangement with the principal debtor, without the consent of the surety, prolongs the time of payment, or changes the nature of the contract, applies to the discharge of a prior endorser. The deliberate cancellation, by the holder of the endorsement, must discharge the liability of such endorser to the holder, and so operating, it will also discharge from liability to the holder, the subsequent endorser.

These principles are fully maintained in the following cases—(Brown vs. Williams, 4 Wendell's R. 360; James Lynch vs. Reynolds, 16 Johns. R. 41; Sargent vs. Appleton, 6 Mass. R. 88; English vs. Dailey, 3 Espinassie's R. 49.)

It may be, that the endorsement of S. Roulston is open to explanation. He may be an accommodation endorser for the plaintiff in error, and not responsible to him in any event; or, the name of S. Roulston may be on the paper, not strictly as endorser, but to indicate to the bank discounting the paper, his ownership of the note.

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But nothing of that kind appears in the record, and we must judge of the legal effect of the endorsement, from the predicament of the record, as presented to us. These remarks are made, to prevent any conclusion from being drawn, which the opinion is not intended to warrant.

The record further states, that the plaintiff in error "produced the notice, with the certificate of the president of the bank endorsed thereon;" whereupon the defendant, by his counsel, objected, &c. The notice and certificate here recited to have been produced, must, we think, be taken to refer to the notice and certificate, which are sent up with the transcript, and, by reference to them, we find them to be sufficient.

In the case of *Bates vs. the Planters' and Merchants' Bank*, (page 99,) to which we have been referred, there was no recital in the judgment, that either the certificate or notice were produced to the court; and we there held, that we could not infer that the notice and certificate sent up with the transcript, were those on which the court acted, as it did not appear that any notice or certificate had been produced to the court, or any action of the court had upon them. But we held, that appearing and contesting the claim, was evidence of notice.

In cases of this summary character, the judgment, whether by default or otherwise, must shew affirmatively every fact necessary to give the court the summary jurisdiction. In judgments by default, the liability of the defendant for the debt, must also be shewn. Where an issue is made up, the verdict will ascertain the defendant's liability, as in other cases, in suits brought in the ordinary mode; and it is unnecessary to encumber the

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record either with the proof or fact of notice, or of those facts which constitute the liability for the debt. Should either party desire to reserve the legal sufficiency of the facts, it can be done by bill of exceptions, or by demurrer to the evidence. As to the terms of the notice required by the statutes in these summary proceedings, the law was correctly laid down by the court in the case of *Lyon vs. the State Bank*, (1 Stewart, 466.) "A notice in writing, which so far identifies the debt for which judgment will be moved, as to afford reasonable certainty, is deemed sufficient."

We are induced to give this as the result of all the adjudged cases, on the statutes authorising these summary proceedings, from the great number of suits instituted in this mode since the increase of the banking capital of the State, and the uncertainty which seems to prevail on the subject.

The first assignment of error is not sustained. The objection to the notice is understood to be rested by counsel, on the terms of the charter of the bank; the substance of which, so far as it relates to this question, is, that the *corporation* may recover their debts in this summary mode, by giving ten days notice, &c.

It is contended, that as the charter of the bank requires the *corporation* to give notice, it cannot be done by the attorney at law of the corporation. It cannot be doubted, that a corporation can do an act *in pais*, by an attorney in fact; and we can see no reason why the notice, which is but the commencement of a suit in this summary mode, should not be given by the attorney at law of the corporation, acting for, and on behalf of the

corporation. A corporation can appear in court, by its attorney ; and it would be passing strange, if the attorney had not power to take the first step in the cause.

In the case of *Osborne vs. the United States Bank*, (9 Wheaton, 738,) it was held, that the authority of the attorney to appear in court, need not be under the corporate seal ; and in the case of *the Bank at Montgomery vs. Harrison*, (2 Porter, 540,) that the notice required by the charter of the bank to obtain a judgment by motion, did not require the corporate seal to give it authenticity.

The ancient rule applied to corporations existing by the common law, that they could only act through their common seal, has no application when applied to corporations created by statute. The very frame of our banking institutions supposes that their acts will be done by agents, and it would be intolerable, if not impossible, to require their authentication by the seal of the corporation.

For the error of the court below, in permitting the defendant in error to strike out the name of S. Roulston, (who appears on the record, as second endorser of the note,) without explanation, or any sufficient reason being given therefor,—the judgment is reversed, and the cause remanded, for further proceedings in the court below.

Lister vs. Vivian et al.

LISTER vs. VIVIAN et al.

1. The records of a court of limited jurisdiction, should discover every fact essential to the validity of its sentences,—therefore,
2. To enable the Supreme court to review a case under the act of eighteen hundred and thirty-three, (Aik. Dig. 253,) where commissioners had been appointed, by a judge of the Circuit court, to settle the estate of a decedent, the judge of the Orphan's court being interested,—the commission issued by the judge of the Circuit court should appear of record.
3. Its existence and legality cannot be supplied by intendment, or by a recital in the minutes of the clerk of the County court, or the report of the commissioners.
4. And the report of two of the commissioners, is not a decree revisable in error, and an execution issued on such a report of commissioners, may be quashed on motion.

Error to the County court of Washington.

Proceedings by commissioners appointed in lieu of the Orphan's court, where the judge was interested. Execution issued against plaintiff in error.

The record recited, that John James, Joseph Black and John H. Owen, were appointed commissioners by "the circuit judge, to settle the estate of the late Charles Vivian, with Joseph D. Lister, esquire, administrator of said estate, and judge of the County court of Washington county." And further, "that at an adjourned term of an Orphan's court, held in and for said county, on the twenty-second day of January, in the year of our Lord, eighteen hundred and thirty-five, by Messrs. John James, Joseph Black and John H. Owen, the two former present

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—the latter absent—the aforesaid commissioners examined the charges and statements, and all matters relative to the estate of the late Charles Vivian, deceased, wherein the honorable Josiah D. Lister, administrator thereof, was concerned, and made an estimate, of what to them appeared, from all the evidence before them, to be just; which said report was ordered to be filed.”

The report then set forth the amounts and dates of a number of notes, made by different individuals, which, with interest, amounted to more than eight thousand dollars. It also contained a charge for the hire of negroes, which, with interest, amounted to near one thousand dollars. Then follows an affidavit, in these words:

“The State of Alabama, Washington county.

“Personally came before me, William Grimes, clerk of the County court of said county, Messrs. John James and Joseph Black, commissioners appointed by the honorable the judge of the Circuit court, to make settlement of the estate of Charles Vivian, deceased, with Josiah D. Lister, administrator thereof; have examined the said case, to the best of our abilities, and make our report thereupon, as appears on this sheet. Sworn to and subscribed before me, this 22d day of January, A. D. 1835.

“*Wm. Grimes*, Cl’k.

“JOHN JAMES,

“JOSEPH BLACK.”

This is an abstract of so much of the record, as relates to the appointment of the commissioners, the settlement, and their report. And on this, the clerk of the County court issued an execution for the aggregate sum with which the plaintiff is charged by the settlement. Upon the supposition that the record discovers a final order or decree, a writ of error is prosecuted to this court.

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Gayle, for plaintiff in error.

Porter, contra.

COLLIER, C. J.—The authority of the commissioners to adjust the administration accounts of the plaintiff, it is said is founded on the order of the judge of the Circuit court, and the right of the judge of the Circuit court to appoint them, is deduced from the first section of the act of eighteen hundred and thirty-three, (Aik. Dig. p. 253, s. 41,) which is as follows :

“In all settlements hereafter to be made by executors, administrators or guardians, with the Orphan’s court, in which the judge of said court may have been employed as counsel, or may be otherwise interested in such settlement, it shall be the duty of said judge to give immediate information of the fact to one of the judges of the Supreme or Circuit courts, who shall thereupon issue a commission to three persons of the proper county, directing and empowering them to proceed to make such settlement under the rules and regulations now prescribed by law.”

Without pretending to decide whether a *majority* of the commissioners directed by the act to be appointed, are competent, independent of the co-operation of the third, to make a settlement, we are clear that the commission issued by the judge of the Circuit court should appear of record. This commission is a special authority, and the only warrant for the acts of the commissioners. Its existence and legality cannot be supplied by intendment, or by a recital in the minutes of the clerk of the County court, or the report of the commissioners;

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but the paper itself must appear, that it may be seen whether it furnishes a warrant for the acts done under its authority. This conclusion is too clear to require further illustration. It is fully sustained by the rule that requires the records of a court of limited jurisdiction, to disclose every fact essential to the validity of its sentences.

The report does not fix a liability upon the plaintiff, even according to the most unfavorable interpretation of its terms, unless it be for so much as relates to the negro hire. It may be true, that the plaintiff, as administrator of his intestate, received all the notes mentioned in the report, and yet not be chargeable for their nominal amount in money. To be personally liable, it should have been shown, either that he had collected or appropriated them to his own use, or else that they were lost by his neglect, &c.

But, apart from all these objections to the proceedings of the commissioners, they afford no warrant for an execution. The statute which gives an execution on the decrees of the Orphan's court, enacts that "all decrees made by the Orphan's court, on final settlements on the accounts of executors, administrators and guardians, shall have the force and effect of judgments at law, and executions may issue thereon for the collection of the several distributive amounts against such executor, administrator or guardian"—(Alk. Dig. p. 252, s. 37.)

There can be no pretence for saying, that in the case at bar a decree was rendered. There is nothing, as we have already shown, but a very imperfect settlement, reported by two of the commissioners. The act of eigh-

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teen hundred and thirty-three does not *expressly* authorise the rendition of a decree in such a case, so that it may well be questioned whether the *judge* of a county court, as an executor, administrator or guardian, is authorised to render a decree in his favor, or may be required to render one against himself, (and perhaps it is not clear that the commissioners can consummate their settlement by a decree.) There, then, being no basis for an execution, it issued improperly; and had the judge of the County court *been competent* to entertain jurisdiction, it should have been superseded, and quashed on motion. Yet, notwithstanding the irregularity of the execution, we cannot entertain the case, because there is no such order or decree, as is revisable on error.

We have been thus particular, that a guide may be afforded to ulterior action. It remains but to declare, that the writ of error must be dismissed.

LEAVENS vs. BUTLER et UX.

1. In the construction of wills, the controlling rule is, that the court must, if practicable, ascertain the meaning of the testator.
2. In the exposition of a will, every part must be consulted; each word is to have its effect, if it be possible, without thwarting the general intent.
3. A codicil is a part of a will, and is to be construed with it: and may, as a context, confirm, vary, or altogether change an intention expressed in the body of the will.
4. Neither the common or statute law give to an executor *virtute officii*, a right to the possession of the testator's lands:—if they are devised, they pass by the will to the devisee, who has a right to entry and possession; if undevise, they descend to the heir, who is entitled to possession.
5. If the real estate is wanting to pay debts, the executor may obtain an order for the sale of so much as is necessary; and the right to sell in such a case is a naked power, and cannot be defeated by alienation or disseisin.
6. Where power is given by a will to sell lands, it does not require, in order to its validity, the co-operation of all the executors named—the power is attached to the office, and one executor, who has alone qualified, possesses all the power conferred by the will.
7. Where a testator intends that the payment of legacies shall be expedited or delayed—his intention must be followed as nearly as possible.
8. Payment of debts takes precedence of legacies, and a legacy will not, in general, be paid, where the assets will be required to pay debts.
9. But in case of a contingent debt, a legatee will be entitled to the assets, on giving security to refund,—if the debt become absolute.

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10. Where it is obvious that it will be necessary for a legatee to refund, in order to pay debts; or where the will postpones the payment of the legacy to a distant time; or if the payment would defeat the testator's intention—the legatee cannot claim it.
11. Where an executor voluntarily answers interrogatories which he could not be compelled to answer—the answers will be regarded as evidence *de bene esse*.
12. The jurisdiction of the County court, in the adjustment of the estates of deceased persons, is limited—depending upon legislative grants in its favor:—but where the County court is incompetent, the powers of chancery are adequate to the emergency.
13. Executors and administrators, are in almost every respect, considered in equity as trustees.
14. A legatee may sue in equity for the recovery of his legacy; and if a settlement of the estate be necessary, all the parties whose rights are to be effected, or from whom a discovery is desired, may be brought before the court.
15. [According to the English practice, where a will relates to lands only, it ought not to be proved in the spiritual court—but if it embraces personal property also, it ought to be proved there.]
16. [Courts of Equity in England have concurrent jurisdiction with the spiritual courts, for the recovery of personal legacies, in all cases; and in some cases, the jurisdiction of chancery is exclusive.]
17. [In the English chancery, where the civil law is followed, proceedings for the recovery of legacies may be instituted at any time after the expiration of twelve months from the testator's death.]
18. The County court cannot decree distribution of an estate against an executor, where, by so doing, the testator's intention would be defeated.
19. A legatee cannot in this State, in all cases, immediately after

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the expiration of eighteen months from the grant of letters testamentary, coerce a payment of his legacy.

20. The County court has no jurisdiction over the lands of a testator, without the limits of this State.

Error to the County court of Mobile.

Proceedings against an executor.

On the thirtieth day of March, eighteen hundred and thirty-five, Joshua B. Leavens, then of the city of Mobile, made and published his last will and testament, by which, after making an appropriate provision for his funeral, he proceeded as follows: "It is also my will, that my executors hereinafter named, should effectually, and to all intents and purposes, protect, indemnify, and save harmless all the other partners of the firm of St. John & Leavens, against any actual, or contingent liability, loss or injury, imposed upon them, or either of them, by me, in consequence of having assumed the responsibility to lend the name of the said firm of St. John & Leavens, either as drawers, endorsers or securities, for Benjamin Leavens, or the firm of C. Irby & Co.; and also, that they may be protected against any proportion of loss, which may grow out of the loan of money by me, in the name of the said firm of St. John & Leavens, to the said Benjamin Leavens, or the said firm of C. Irby & Co."

The testator then devised and bequeathed one fourth of his estate, both real and personal, to the plaintiff—an equal portion to his sister, Susan Leavens, and the rest and residue of his estate, to his daughter, Helen Naomi, to be paid to his brother Benjamin, and sister Susan, until his daughter should attain the age of majority, or should marry, in either of which events, the same was

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directed to be paid to her. And Benjamin and Susan Leavens were, by the will, appointed guardians and protectors of Helen Naomi.

On the third day of May, eighteen hundred and thirty-five, the testator declared and published a *codicil* to his will, in which he referred to, and expressly confirmed and adopted the same. And, in addition, inserted a clause, as follows: "I do hereby declare and direct, and do give full power and authority, to my said executors, or the survivor of them, and they shall have power, whenever and from time to time as they may think expedient, and according to their discretion, to bargain and sell, convey, lease, release or encumber, or otherwise dispose of, in fee or otherwise, all or any of my real estate, wherever the same may be situate, either for the purpose of paying debts, making division or distribution—or when they shall think it beneficial for any purpose to do so; in which case, the proceeds shall be distributed, kept or applied, as the property is required to be by my said will. The true intent and meaning of this *codicil* being fully to affirm the dispositions of my said will, and the better to enable my executors to carry it into effect, and the better to enable them to place the said property in such a situation, as may be convenient, and more beneficial and profitable—and by giving the power to sell and convey lands, to enable them the more conveniently to benefit all parties interested in the bequests thereof."

The testator appointed by his will, Benjamin Leavens and Joseph E. Sheffield, his executors; and shortly after died.

On the eighth day of July, eighteen hundred and thir-

ty-five, the plaintiff in error, one of the executors named, produced the will and codicil, and having proved the due execution of each, and given bond, and taken the oath thereto required by law, received from the County court of Mobile, letters testamentary, authorising him to execute the same.

And afterwards, on the twenty-fourth day of February, eighteen hundred and thirty-eight, the defendants in error, exhibited their petition to the judge of the County court of Mobile, setting forth the marriage of Thomas J. Butler with Helen Naomi, the daughter of the testator,—the grant of letters testamentary to the plaintiff—the expiration of more than eighteen months since that time—the neglect of the plaintiff to settle his accounts, and make distribution of the estate. The petition thereupon prayed, “that said executor, Benjamin Leavens, be required to make settlement as the law provides, of his executorship of said estate, and also to make distribution of the same, and to pay over and deliver to your petitioners, the one full half of the property and nett proceeds of said estate, according to the provisions of said will, and of the statutes of distribution in such cases made and provided.”

The petition concluded, by praying that citation, and all other necessary process might issue, &c. And being verified by the petitioner, Thomas J. Butler, an order was made upon the petition, requiring the issuance of a citation, returnable on a day named in the order.—Whereupon a citation was issued, and served on the plaintiff in error, requiring him to appear before the judge of the County court of Mobile, on a day therein

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state], "and shew cause why a settlement of the affairs of the estate of his testator should not be made, and to render an account of his administration thereof; and further, to shew cause why distribution should not be made of said estate, under the provisions of the will, and the distributive share of the petitioners paid over to them, and further to do and receive, abide and perform whatever decree or order the court might make in the premises."

The plaintiff in error, appeared in the County court, and filed an answer on oath, professing to disclose, to some extent, the condition of the estate of his testator, and assigning reasons why the same could not be settled, and the petitioners' interest, under the will, assigned to them.

The defendants in error stated upon the record, certain exceptions to the plaintiff's answer, and exhibited a number of interrogatories, touching the affairs of the estate, and the plaintiff's administration of the same, which he severally answered on oath.

These answers denied that the debts of the testator had all been paid, and stated that Samuel St. John, junior, surviving partner of the testator, had rendered an account against his estate, amounting to one hundred and ninety-seven thousand, seven hundred and fifty dollars, eighteen cents. That the account with which the estate was charged for C. Irby & Co., as presented, amounted to forty-two thousand, eight hundred and fifty-five dollars, twenty-one cents. In addition to which, the contingent liabilities of the testator's estate, on account of C. Irby & Co. amounted to the sum of about ninety-eight thousand dollars. The plaintiff did not know what might be due

into effect his intention. In the exposition of a will, regard is not to be had exclusively to a particular clause or clauses, but every part of it must be consulted—each word is to have its effect, if this be possible without thwarting the general intent. The testator is not to be supposed to have used language, without having some definite meaning in view; and the rule is not to reject words, unless there cannot be a rational interpretation of them as they stand—(Ward on Legacies, 194, *et post*, and cases there cited; 18 L. Lib.; Capel et al. by their guardian vs. McMillan, and cases there cited, S. C. of Ala. June, 1833; 1 Yeates' Rep. 45, 319, 342, 432, 518; Ram on Wills, 1, 2, 31, 45, 64, 98, 100, and cases there cited; 8 L. Lib.; Cook et al. vs. Holmes, 11 Mass. Rep. 528.)

A codicil is a part of a *will*. It is therefore to be construed with it, and may, as a context, confirm, vary, or altogether change an intention expressed in the body of the will—(Ward on Legacies, 194, Ram on Wills, 263.)

The testator declares by his will, the intention most clearly, that his debts shall be paid by his *executors*. In addition to which, he specially directs that his executors should effectually, and to all intents and purposes, protect, indemnify, and save harmless, all the other partners of the firm of St. John & Leavens, against any actual or contingent liability, loss or injury imposed upon them, or either of them, by him, in consequence of his having assumed upon himself to lend the name of the firm of St. John & Leavens, either as drawers, endorsers or securities, for Benjamin Leavens, or the firm of C. Irby & Co. The will further provides, that the other partners of St.

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John & Leavens, shall be protected against their proportion of loss, which may be occasioned by the loan of money by the testator, in the name of the firm of St. John & Leavens, to Benjamin Leavens, or C. Irby & Co.

And the testator, as if willing to confer the fullest power upon his *executors*, compatible with the nature of the trust, by the codicil to his will, invests them, or the survivor of them, with authority from time to time, according to their discretion, to bargain and sell, convey, lease, release or incumber all or any part of his real estate, wherever the same may be situate, either for the purpose of paying debts, making division or distribution, or when they shall think it beneficial, for any purpose to do so.

The will and codicil taken together, in addition to making the executors trustees of the testator's estate, authorises them, without obtaining a special order of court, to sell, or otherwise dispose of the real estate of the testator, whenever, in their judgment, it may be proper. Here is a trust and a power united, both of which are more extensive than those conferred upon an executor, either by common or statute law—(Steele et al. vs. Worthington, 1 Ohio R. 358.) Neither of these sources of authority give to an executor *virtute officii*, a right to the possession of the testator's lands. If the lands are devised, they pass by the will to the devisee, who has the right of entry and possession—and if undevise, they descend to the heirs, who are entitled to the possession. If the real estate is wanted to pay the debts of the testator, the executor may obtain an order for the sale of so much as is necessary, though it be in the possession

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the testator's estate, as devised and bequeathed to his daughter, Helen Naomi.

The right of the defendants, is asserted under the following statutory provisions :

"Sec. 13. Any person entitled to the distribution of an intestate's estate, may, at any time after the expiration of eighteen months from granting the letters of administration, petition the County court, setting forth his claim, whereupon it shall be the duty of said court, to grant a rule on the administrator, administratrix, or administrators, (as the case may be,) to make the distribution agreeably to law ; but no administrator, administratrix, or administrators, shall be compelled to make distribution at any time, until bond and security be given by the person entitled to distribution, to refund a due proportion of any debts or demands, which may afterwards appear against the intestate, and the costs attendant on the recovery of such debt.

"Sec. 14. Any person entitled to a legacy, or any estate by will, shall be entitled to the provisions of the foregoing section, as in case of administrators : *Provided*, That nothing herein contained shall be so construed, as to compel any distributee to give bond and security as aforesaid, for his or her distribution of the estate of any intestate, after a final settlement shall have been made by the administrator or administratrix"—(Aik. Dig. 155.)

The statute, according to its letter, would require a rule to be made on an executor, to make distribution and division, but the nature of the thing required to be done, forbids that the act should receive a literal interpretation, by making the rule mandatory in its terms. It is

John & Leavens, shall be protected against their proportion of loss, which may be occasioned by the loan of money by the testator, in the name of the firm of St. John & Leavens, to Benjamin Leavens, or C. Irby & Co.

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Let it be granted, that the plaintiff has been neglectful of his duties, in not having paid the debts provided for by the *will*, and yet the proceeding in the County court cannot be maintained. If the estate of the testator was wrested from the *executor*, and divided among the devisees and legatees, how could he save harmless the surviving partners of St. John & Leavens? It has been answered, that the plaintiff himself was a member of the firm of C. Irby & Co., and that the one fourth of the estate to which he is entitled, is first chargeable for the defaults of that firm. Upon the concession that this assumption is correct in law, it may be asked, how are we to know that the interest of the plaintiff will be sufficient to pay the debts of the testator's estate? The demands nominally largely exceed that proportion, and though perhaps they are to a great extent unjust, yet their amounts are unascertained, so as to have enabled the County court to say what was due.

The power to sell the lands, in order to its valid execution, does not require the co-operation of both the individuals named as executors in the will. It is attached to the office; and though the plaintiff in error has alone qualified, he possesses all the power conferred by the will in this particular—(Taylor & Morgan vs. Galloway et al. 1 Ohio Rep. 104; Lessee of Lloyd vs. Taylor, 1 Yeates' Rep. 422.)

In this view of the case, (and it is clearly authorised by the record,) would not the testator's intention most probably be defeated, if his estate was now divided between the beneficiaries under his will? His surviving partners might be sued, and recoveries had against them

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for debts, which he had invested his executors with ample authority, as well as means, to pay, as soon as they were advised of their existence, and the partners be thus left to seek their reimbursement by a course of protracted litigation—(Riddle & Co. *vs.* Mandeville, 5 Cran. R. 330.)

The period prescribed by the civil law, and which is followed in the English court of chancery, where the will does not prescribe an earlier or later time, is to allow proceedings to be instituted for the recovery of legacies, at any time after the expiration of twelve months from the testator's death. This allowance is not, however, regarded as a positive rule, but merely intended for convenience, that the debts of the testator may be ascertained, and the executors be informed of the amount of the assets. If, therefore, the situation of the estate be such as to enable the executors to pay the legacies within the year, they are not restrained by law from doing so. Lord Redesdale held, if a case was produced, in which it was quite clear that there were no debts, the court would give the fund to the legatee, though the twelve months had not elapsed—(Pearson *vs.* Pearson, 1 Scho. & Lefr. Rep. 12; To S. P. Garthshore *vs.* Chalie, 10 Vesey's R. 13.)

But if it can be collected from the *will*, that the testator intended the payment of the legacy should be expedited or delayed, the intention of the testator must be followed as near as possible—(Ward on Legacies, 287; 2 Williams on Ex'ors, 854, 855; 1 Roper on Legacies, 579.)

Again:—The payment of the debts will claim precedence of the legacies, and the court will not, in general,

order legacies to be paid, where it appears that the assets will be required to pay debts—(1 Roper on Leg. 316, 579, 588; Ward on Leg. 369; 2 Williams on Ex'rs, 652, 830.)

It was at one time a much mooted question, whether an executor could retain a sufficiency of the assets to satisfy a *contingent debt*, but it is now settled, that the legatee will be entitled to it, on giving security to refund, should the debt become absolute; or he may have it paid into court for its better security—(Ward on Leg. 379, and cases cited; 2 Williams on Ex'ors, 830, 835, and cases cited.)

Thus, we learn, that a legatee is not, under all circumstances, according to the English rule, entitled to be paid his legacy immediately after the year. If it is obvious that it will be necessary for him to refund, in order to pay the debts of the estate, or if the will itself puts off the payment to a distant time; or if the payment would defeat the testator's intention; the legatee cannot claim it. In the case at bar, we have shown, that if the decree of the County court was upheld, the intent and desire of the testator to protect his surviving partners, would probably be thwarted.

It must be remembered, that the County court, in the adjustment of the estates of deceased persons, is indebted for its existence and powers to the several statutes on the subject. Its jurisdiction is, of course, limited, depending upon the extent of the legislative grants in its favor; and of consequence, cases must arise, in which it will be incompetent to administer complete justice between all parties interested. Yet, it will not follow, because this

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jurisdiction is imperfect, that a party interested in the estate of a deceased person, is without remedy to obtain his rights. The powers of a court of chancery are adequate to the emergency.

Executors and administrators, are in almost every respect, considered in equity as trustees—(Graff vs. Castleman et al. 5 Rand. R. 195; Dodson vs. Simpson, 2 Rand. R. 294; Knight vs. Yarborough, 4 Rand. R. 367; Field vs. Schieffelin, 7 Johns. R. 157; Petrie vs. Clark, 11 Serg. & Rawle's R. 377; Grasser vs. Eckart, 1 Binn. R. 575; Boudinot vs. Bradford, 2 Dall. R. 268; Wilson vs. Wilson, 3 Binn. R. 562; Wilson vs. Wilson, 9 Serg. & Rawle's R. 428; Neaves' estate, 9 Serg. & Rawle's R. 186; Willis on Trustees, 69, n. (1) 136, n. (m) 138, n. (t); L. Lib.; Ram on Wills, 538, 539.)

Upon this principle, chancery exercises jurisdiction over them, by compelling an executor to apply the property of his testator to the payment of debts and legacies, according to the directions of the will, or in case of intestacy according to the statute of distributions—(1 Williams on Ex'rs 157; 2 Ibid. 239.) Hence, a court of equity will entertain a bill for a personal legacy; or for the distribution of the intestate's personal estate, and will compel an executor or administrator, in the same manner as it does an *express trustee* to discover and set forth an account of the assets, and of his application of them. (2 Williams on Ex'rs, 1239, and cases there cited.)

An account has been decreed by the English chancery, of an intestate's personal estate, even after an account taken and distribution decreed in the spiritual court—(Bissell vs. Axtell, 2 Vern. Rep. 47; Dulwich College vs.

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Johnson, 2 Vern. R. 49; Phipps vs. Steward, 1 Atk. 285; 2 Fonb. Eq. 380, n. (b.) And bills for the discovery of assets have been there entertained before probate, or during the litigation in regard to it, in the spiritual court.

A legatee may sue in equity for the recovery of his legacy, and if a settlement of the estate be necessary, all parties whose rights are to be affected, or from whom a discovery is desired, may be brought before the court—(2 Williams on Ex'rs, 1241; Fellows vs. Fellows, 4 Cow. R. 682; Deeks vs. Strutt, 5 T. R. 692; Ward. on Leg. 384; 2 Roper on Leg. 536.)

According to the English practice, where a *will* relates to lands only, it ought not to be proved in the spiritual court—but if it embraces personal property also, it ought to be proved there; yet the probate will not prejudice the heirs, inasmuch as it will not attest the validity of the *will* as to the lands, nor will the examination of the witnesses in that court, be evidence in the courts of common law. Therefore, if in the case of a *mixed will*, it be necessary to prove a devise of lands in a suit concerning it in any of the temporal courts, it is necessary to give the will itself in evidence, and for that purpose, it is usual in trials at *nisi prius*, to procure the attendance of the proper officer of the ecclesiastical court, who produces the original will from the registry, in which, after probate, it has been deposited. When the *will* is wanted in chancery, that court will make an order upon the prerogative court, to deliver it to the registrar's office in chancery, to lie there till the court of chancery shall have done with it—(1 Williams on Executors, 215, 218; Tucker vs. Phipps, 3 Atk. R. 361.)

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The jurisdiction in equity, is in some instances concurrent with the ecclesiastical court, while in others it is exclusive. Where the bequest of a legacy involves the execution of trusts, either expressed, or by the construction or implication of the court, or where the trusts themselves are to be pointed out by the court; or where the remedy itself can only be enforced under the peculiar power of a court of chancery, as where a discovery of assets is required. In these and similar cases, equity has *exclusive jurisdiction*, and will protect it by the process of injunction—(2 Williams on Ex'rs, 1268, and cases cited; 2 Roper on Leg. 537, and cases cited.)

But it is said suits for legacies are now rarely brought in the ecclesiastical courts—legatees finding the authority of these courts incompetent to enforce a discovery of assets, were frequently driven for that purpose into equity. Which court, to prevent circuitry of suit, exercised a complete jurisdiction in the matter, by enforcing the discovery, and decreeing payment of the legacies—(Cowp. R. 287; 5 Maddock's R. 357; 3 Ridg. P. C. 243.)

Again:—Equity, it is said, will entertain jurisdiction, where lands are devised to pay debts and make distribution, and will regard the proceeds as equitable assets—(Benson *vs.* Le Roy, 4 Johns. Ch. R. 654, 658, and the authorities cited in the argument of the plaintiff's counsel, 653.) And if a trustee disregards the directions of the will in the execution of a power, the authority of chancery is adequate to his removal—(Parsons et al. *vs.* Winslow, 16 Mass. R. 361.)

And in Elmendorf *vs.* Lansing, (4 Johns. Ch. R. 565,) "It is a settled principle," says Mr. Chancellor Kent, of a

court of equity, "that an executor, or other trustee, who mismanages, or puts the assets in jeopardy by his insolvency, either existing or impending, should be prevented from further interfering with the estate, and that the funds should be withdrawn from his hands. The authorities to this point are sufficiently numerous." So, the law may be regarded as settled, that "an executor is personally liable in equity for all breaches of the ordinary trusts, which in courts of equity are considered to arise from his office—(2 Williams on Ex'rs, 1104; Mucklow vs. Fuller, 4 Cond. Eng. Ch. R. 94, 95.)

Thus, we have shown that courts of equity have in England a concurrent jurisdiction with the spiritual courts, for the recovery of personal legacies in all cases—that in some cases, the jurisdiction of the former is exclusive. Whether the devisee of a defined tract of land can maintain an action for the recovery of the possession, on the ground that the will operates a conveyance in his favor—or whether, in such case, the assent of the executor is necessary to give a right of entry, we need not determine; since it is clear, that that case is unlike the present—(Ram on Wills, 3, 8; Ewer vs. Jones, 2 Salk R. 415; Willard vs. Nason, adm'r, 5 Mass. R. 240; Ram on Assets, 508, n. (a.)

Here, there is no specific devise of lands to the defendant, Helen Naomi. The plaintiff is allowed to convert the lands embraced by the will, into money, either to pay debts, to make division, or for any other purpose deemed beneficial by him for those concerned. So that if the plaintiff is allowed to proceed in the administration, controlled alone by the limitation prescribed to his discretion

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by the will, there may be no lands to divide, when the business of the estate shall be brought to a close.

If the plaintiff has been neglectful in the execution of the trust—if he has been guilty of *mala fides*—if the rights of the defendants are in jeopardy—these and many other causes would furnish reasons for a court of equity to protect them by making the necessary orders. That court is also competent to bring all persons in interest before it, and make a definitive disposition of the claims of all parties.

Further—The decree of the County court is erroneous, in directing the division of the lands situate in other States. The County court could not exercise a jurisdiction over the estate of the testator beyond the reach of its process. The *lex rei sitæ* must determine the validity of a will of lands—(Kerr vs. the Devises of Moon, 9 Wheaton's R. 565; McCormick vs. Sullivant, 10 Wheat. 192, 202)—and that law must be proved as a fact, where it becomes a matter of enquiry in a foreign court. Yet the County court, without requiring it to be shown whether the will conformed to the laws of Mississippi, Illinois and New York, determined that it was operative upon the real estate of the testator, situated within these States.

Letters testamentary granted in one State, will not authorise an executor to sue in his representative character, without the jurisdiction of the power by which the letters are granted—(Dixon's ex'rs vs. Ramsay's ex'rs, 3 Oranch's R. 319, 323; See also Fenwick vs. Sears, adm'r, 1 Oranch's R. 259; 1 Williams on Ex'rs, 204, and cases cited in note (1.)

The case would be different, if lands were devised to an executor. There the executor might sue as a devisee. He would derive title from the will, without the aid of the letters—while an executor, who is a mere trustee for the purposes of the will, cannot prosecute an action, but by virtue of the letters—(Doe, Lessee of Lewis and wife vs. McFarland et al. 9 Cranch's R. 151.)

In the case before us, we have said that the plaintiff cannot claim as a devisee—that the *will* merely annexes to the *office of executor*, the power to sell the lands of the testator. Yet the County court, by its orders and decree, undertakes to divest the executor of these and vest them in others, though it does not appear that the laws of the States in which the lands are situate, recognise him as entitled to exert any authority over the real estate of his testator.

So, it has been holden, that lands lying in other States than that in which the letters testamentary are granted, cannot be regarded as assets in the latter—(Austin vs. Gage et al. 9 Mass. R. 395.)

Other points were made at the argument, and are presented by the record, which we decline considering, as those already noticed will probably lead to a decision of the rights of the parties upon their merits.

To recapitulate, we are of opinion—

First—That the County court cannot decree distribution of an estate against the executor where by so doing, the testator's intentions would be defeated.

Second—That in the present case, the decree of the County court, if sustained, would most probably defeat the testator's intent.

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Third—That a legatee cannot, *in all cases, immediately* after the expiration of eighteen months from the grant of letters testamentary, coerce a payment of his legacy.

Fourth—That the decree of the County court is erroneous, in assuming jurisdiction over the lands of the testator, without the limits of this State.

Fifth—That a court of chancery has ample power over the subject of legacies, and in such cases can administer complete justice—and in the present case, that tribunal is peculiarly appropriate for the adjustment of the rights of all interested under the will.

It remains but to add, that the decree of the County court must be reversed, and the cause remanded.

GOLDTHWAITE, J., not sitting.

The Planters' & Merchants' Bank of Mobile *vs.* Andrews.

**THE PLANTERS' AND MERCHANTS' BANK OF MOBILE *vs.*
ANDREWS.**

1. A privy in interest in attachment, may at all times point out defects in the proceedings, and submit a motion to quash.
2. And, *it seems*, that the practice of quashing attachments, where the remedy is unauthorised, or the requisitions of the statute not complied with, upon the mere motion of strangers to the record as *amici curiæ*, has prevailed so long, that it is not now considered irregular.
3. A defective bond is not a sufficient cause for quashing proceedings by attachment, unless plaintiff declines executing a perfect bond.
4. A possible debt, depending upon a contingency which may never happen, cannot be proceeded on by attachment: but
5. Where neither the writ, affidavit or bond, allege that defendant's estate was attached to satisfy a contingent liability—it will be presumed that the undertaking for which plaintiff seeks redress, is absolute.
6. The endorsement on an attachment is no part of the record, as the law does not require that the cause of action should be so endorsed; and will not be looked to, to ascertain the nature of the demand, forming the basis of the attachment.
7. The object of the fifth section of the constitution, article on banks, was, to restrain the legislature from granting to banking corporations, *exclusive* facilities in the collection of its debts, but does not deprive the banks, in common with other creditors, of the benefit of process by attachment.
8. Corporations allowed to sue and be sued, necessarily possess authority to perform by their agents, services incident to the commencement or prosecution of suits.
9. The term *person*, in a statute, embraces not only *natural*, but *artificial* persons, unless the language indicates that it was

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employed in a more limited sense—therefore, a corporation is a person, within the meaning of the attachment laws.

Error to the County court of Mobile.

Attachment.

The plaintiff in error caused an attachment to be issued against the defendant, returnable to the County court of Mobile, upon the affidavit of their cashier and agent, which declared "that Solomon Andrews, of the city of Mobile, was indebted to the said Planters' and Merchants' Bank of Mobile, in the sum of two hundred and seventy thousand and eighty-five dollars, and twenty-one cents, on bills of exchange, which had not arrived at maturity, and which were not yet due, but which would fall due from the then present time, at various periods, to the twenty-sixth of September ensuing." And he further saith, "that the said Solomon Andrews absconds, so that the ordinary process of law cannot be served upon him," &c. The affidavit bore date the twenty-first day of April, eighteen hundred and thirty-seven.

The attachment was of even date with the affidavit, and was not objected to. The bond conformed to the attachment, save only in reciting the time of its return. It substituted the *first* for the *second* Monday in June, as the time when the County court of Mobile was to be holden.

On the attachment, a cause of action was endorsed, in these words:

"This action is brought to recover of the defendant, the amount of fifteen bills of exchange, drawn by him on H. M. Andrews & Co., and which are running to maturity, but which have not yet fallen due, and will be-

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come due at divers times from the date hereof, to the twenty-sixth day of September, eighteen hundred and thirty-seven—viz. one bill for twelve thousand five hundred and eighty-five dollars, twenty-one cents; one for twenty-five hundred dollars; two for ten thousand dollars, each; nine bills for twenty thousand dollars, each; and three bills for twenty-five thousand dollars, each; and which bills are the property of the plaintiff, and payable to it."

From the sheriff's return, endorsed on the attachment, it appeared to have been received by him, and levied on certain property supposed to belong to defendant, and also served in the hands of several individuals, supposed to be indebted, &c. to the defendant.

In the record, we found a declaration charging the defendant, as the drawer of fifteen bills of exchange, falling due subsequent to the issuance of the attachment, and also a general *indebitatus assumpsit* count, for money lent, &c. had and received, &c.

The following judgment was rendered by the County court: "This day came the plaintiff, by its attorneys, and moved the court for judgment by default against the defendant, Solomon Andrews, for want of an appearance and plea, and also moved the court for judgment against the several garnishees, who have been summoned to answer in this cause, and who have failed to answer within the time prescribed by law, to wit: against Joseph Wood, James B. Craighead, William R. Hallet, President of the Mobile Bank, John Gayle and William J. Vandegraff, Andrew Armstrong, Cashier of the Branch of the Bank of the State of Alabama, at Mobile, William R.

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Hallet, Jonathan Emanuel, Thomas W. McCoy, Audley H. Gazzam, Edward Hanrick, Lewis Andrews, partner of the firm of Andrews & Brothers;—and also moved that the court proceed to try the right to the property levied on and claimed by Joseph Wood, and also to that levied on and claimed by William R. Hallet, as the property of Robert Wilson, Hallet and Company, respectively.

“And thereupon came James B. Craighead, esquire, Messrs. Gayle & Vandegriff, esquires, and Gordon, Chandler & Campbell, esquires, *amici curiæ*, and who moved the court to quash the attachment, and all the proceedings thereupon, had on the following grounds: First, the want of an affidavit, according to the statute. Secondly, for want of a proper bond. Thirdly, for defects in the writ.”

“And the said *amici curiæ* also moved the court to set aside the proceedings for irregularity, because the declaration does not correspond with the attachment;—because the attachment was taken for a debt not due; because, upon the attachment and declaration, it discloses a case upon which no attachment ought to have issued; and because the whole proceeding is uncertain, variant and illegal: all which being seen and heard by the court, and due deliberation being thereupon had, it seems to the court, that the said attachment,” &c. “should be quashed, and the same are by the court quashed and dismissed.”

The court refused the motion for judgment, &c. as made by the plaintiff, and rendered a judgment, against the plaintiff for cost.

From a bill of exceptions, sealed by the judge of the

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County court, it appeared that the plaintiff tendered a new bond immediately after the decision upon the motion to quash was announced, conforming to the affidavit and writ of attachment, which the court refused to accept, though entirely satisfied of the solvency of the surety who executed it.

Under the state of facts above disclosed, this case was brought here by appeal.

The assignments of error now made are as follows:

1. The court erred in quashing the said attachment.
2. The court erred, as set forth in the bill of exceptions taken by the appellant below.
3. The court erred in rendering judgment below against the appellant.
4. The court erred in refusing to render judgment for the plaintiff below, as moved for by it.
5. The court erred in refusing to allow the motions made by the appellant.
6. The court erred in sustaining the motions made by the *amici curiæ* in the court below.
7. The court erred in discharging the garnishees below.

Stewart, for the plaintiff in error.

Campbell, contra.

Stewart, for plaintiff in error.—The objection made is, that the attachment will not lie, because the liability is not a contingent one, and not due, and may never become a debt due; and the case of *Benson vs. Campbell* is cited to sustain that position.

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That the debt is not yet due, is not the objection—(See Alkin's Dig, p. 37.) An attachment will lie for a debt not yet due, and the attachment shall be a lien until the debt becomes due. The law does not, by the attachment, authorise a judgment on such a demand before due; it merely authorises a party to secure and obtain security for his debt, until it becomes due; and whether there shall be a recovery or not, must depend upon whether the liability is completed afterwards or not—it is very different from the case where a judgment is allowed at once abating interest. Such is not the remedy given by our statute.

A mere contingency of itself, is not a sufficient objection—for all obligations payable at a future day, may be said to be contingent. If a note, payment may be made—a set off may be set up—the consideration may fail—the note may be altered by the holder, and become void. If the note be a joint and several one, it may be paid by another party—taken up by an endorser, &c.

All obligations are at least contingent as to the question of payment, for the obligation may be paid at maturity; and if so, there never can be a judgment. Then, in all cases of this nature, whether there shall ever be a judgment or not, will depend upon the occurrences to happen after action brought, and there can exist no possible case where this contingency does not exist, and where the right of action exists at the time of suit brought, and where we can say there will certainly be a judgment eventually on the demand; whether there shall be a judgment or not, depends on a contingency. It is, therefore, not the contingency merely, which is to

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govern us—but either we must make a distinction between different degrees of contingency, or seek a new principle of distinction.

These reflections and others, lead me to the conclusion, that whether the debt be merely contingent or not, would make no difference under this statute. But there is a decision of the court, and if the court are satisfied with the propriety of the decision, then we must examine the extent to which the principle decided, is to be carried.

If the objection is to rest upon the question of contingency, (and all cases must necessarily be more or less contingent,) then it is the degree and extent of the contingency which we must investigate. It is evident the rule must have a limit, and there must be some stopping place; the line of demarcation between cases where the attachment will lie, and where it will not, must be drawn. How far will the court extend it?

The case of Benson vs. Campbell, was a most presumptuous attempt to attach, without any right or title whatever, and that case, so far as the facts of it are concerned, proves nothing. In that case, Campbell was not the holder of the bill. He had endorsed a bill as a surety, and had paid nothing, but became alarmed, lest he should afterwards become liable, and be compelled to pay, in which case he would have a claim against his principal; but he parted with no consideration—paid no money—and had no right to recover against any body; but the holder of the bill was the party entitled to the money. The case there was, that he might first become, by possibility, liable himself; then he might pay, and then he

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would have a claim against Benson. This was a preposterous claim. These facts appeared in the writ of attachment. It recited no indebtedness whatever, present or future. There was no declaration. The court said they would remand, if the fault was in the declaration; but "no declaration could be framed on that writ,"—therefore, they would reverse *in toto*. There was no affidavit of indebtedness. The objection there was *radical*—not merely technical—it was absolute, and advantage of it taken by the defendant himself. No case could be framed on it which would authorize a recovery. From the facts shewn, it was apparent that it was not a case where there might be, or might not be, a right to recover, but it was a case where it was conclusively shewn that there could be no right.

Our case is different. Suppose that on our writ, we should have framed a declaration, shewing an absolute liability at all events—then there could have been no difficulty. In the affidavit in our case, we shew on oath an *absolute* indebtedness. The endorsement on the writ, can never be taken to defeat the writ. It cannot be resorted to for that purpose. Suppose the declaration was variant from the endorsement on the writ—the variance could only have been taken advantage of by plea in abatement—not by demurrer; and if he failed to do so, it was not error. The proceedings in attachment say the statute must be liberally construed.

Ours is a case where it is not conclusively shewn from the declaration, much less the writ, (and it is the writ which is quashed—the quashing of the declaration, or setting it aside, or refusing to grant our motion for judg-

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ment by default, could not have injured us, for we would have amended it, and filed a new one, shewing absolute liability, which could be done, without any inconsistency with the writ, affidavit or endorsement;) whether the debt is absolute or not. It may for aught the court knows, from the writ, affidavit and endorsement, be a case of absolute liability on the part of S. Andrews. The truth of the case—the very facts which can be stated—will afford the best argument possible to prove this. The facts are these: S. Andrews and H. M. Andrews were partners. The firm of H. M. Andrews & Co. consisted of H. M. & S. Andrews; and H. M. Andrews was a partner with S. Andrews in Mobile, under the name of S. Andrews. The bills were drawn on the New York house, without funds, for the accommodation of the house of S. Andrews in Mobile. S. Andrews got the money, and it was an expedient used to raise money by him; so that in fact he was drawer and acceptor both. No demand was necessary—no notice was necessary to him,—and he, as well as H. M. Andrews, were jointly and severally liable for the whole debt, as drawers, and also as acceptors. (They may, as such, be jointly and separately sued by our statutes.) Suppose these facts had been disclosed by the declaration, the objection would have vanished. It would be a case of positive and absolute, not contingent liability in S. Andrews—for he draws on himself. Then if this be true, and such a declaration could have been filed, the writ could not be quashed, for its sufficiency cannot depend on the goodness or defectiveness of the declaration. The court might have refused to grant us the judgment by default, we

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asked, but should not quash the writ. We would have filed a new declaration.

But I now propose to shew more than this; I propose to shew that the declaration was a good one, and one which would admit of being proved and satisfied by proof of an absolute liability. It is true, that the counts are in the usual form, averring notice, demand, protest, &c. But it does not follow, that we must prove demand, protest and notice, to prove and satisfy the averments of it. Suppose we were to go to trial under this declaration, and then prove the very facts which I have before stated—the court would have told the jury, that if they believed those facts, they must find for the plaintiff; that they were tantamount, and equivalent to demand, notice and protest; that the liability was absolute, because the law would consider such drawing as a fraud on the bank; and that as to the form of the declaration, any thing which would amount to a waiver of demand, notice and protest, or any thing which would shew them to be unnecessary, was sufficient to satisfy the averments of those things, and would have cited law in support of this proposition. And this court would have affirmed that judgment.

This view of the case turns upon the question, whether or not this declaration, in the shape in which it is, would admit of proof of an absolute indebtedness.—There are a great variety of cases, which might be presented, which would satisfy the averments of the declaration as laid, and still be cases of absolute liability. Suppose we were to produce on the trial, an acknowledgment in writing, signed by S. Andrews, dated after

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the drawing of the bills, and before suit brought, as follows: "I agree to waive the necessity of protest and notice, admit that the bills were drawn for my accommodation, and that I received the consideration, and am primarily liable, having no funds in the hands of H. M. Andrews to pay them,"—or any other thing of the same import; or suppose it was shewn that the firm of H. M. Andrews & Co. consisted solely of "Sol. Andrews," himself alone, doing business in New York, under the name and style of H. M. Andrews and Co.—or any other state of facts whatever, of which a thousand might be imagined, which would put those bills in the class of bills in which the drawer was in fact the party primarily liable, and that if any other party paid the bill, he would have an action thereon against him (the drawer) for the amount. Then on the trial, a recovery could be had on those counts, and no special form of declaration was necessary, the general form being sufficient to admit such proof.

It therefore appears, that the case might in fact be a case of absolute liability, or might not, and whether it was or was not, was to appear from the proof. But even if it appeared from the declaration, the declaration can never determine whether a writ, when issued, was subject to be quashed or not quashed. The writ was good or bad when issued, and no subsequent part of the pleading can vary its original merits.

Why shall we say it was bad from its own face? It recites that "Sol. Andrews was indebted in the sum of \$—, to become due hereafter, not contingently, but absolutely." Very different from the case of *Benson vs. Camp-*

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bell: the affidavit is to the same effect, of an absolute indebtedness—the endorsement is not inconsistent with this state of the case, and does not destroy the averments of absolute indebtedness contained in the affidavit and writ. The bond would secure S. Andrews against all injuries which might arise, if the claim was an improper one, and the debt not really an absolute one. He might plead in abatement, that it was a contingent liability, if such was the fact, and abate the writ; but he could not file such plea, because it required to be sworn to, (and he could not deny the fact,) and he would have to give us a better writ, if the liability was absolute. Now, it does not appear that he denied in any way the absoluteness of the debt; but strangers, who do not know whether it is absolute or not, do interfere without it appearing to be, and without pretending that they represent him, and persons who are not liable to him, because of the very fact that they do not pretend to represent him, but they represent their own interest. They injure both plaintiff and defendant, and without authority. I do not deny, that if they had pretended to represent Andrews, that their authority to do so could be disputed, because they are counsellors; but they do not say that they have his warrant, or that they wish to represent his interests. They do not say whose interests they desire to protect, and the presumption is against them.

Andrews himself, was in default for not appearing—the time had passed when the bills had fallen due, and it was by the declaration shewn, that the liability had become, under any view of it, and was, absolute, at the time the writ was quashed. The general statutes of

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Jeofails would prevent our defeat in this case, because the demand must be tried according to its merits, and justice. But the attachment law is still more liberal by its express enactments. If there be no bond and affidavit, it must be abated by plea. There is no part of the statute which authorises the motion to quash, either by the defendant or any one else. The law first required the defendant to replevy, before he was admitted to plead, (Aik. Dig. p. 41, s. 13;) but it was amended so as to allow him to appear and plead without replevying.

Section seventeen provides, that the statute shall not be rigidly construed; even the original papers may be amended. The right to amend is absolute, unless the error was a fraudulent one; nothing else can prevent the amendment.

Section thirty-nine provides, that no attachment shall be *abated* for want of form, much less quashed. The motion to quash must certainly be confined, if it can be made at all, to what appears on the *face of the writ*—for the statute has provided that want of bond and affidavit shall be by plea in abatement—and this court has determined that a defective writ, in the case where the return day is wrong, is not void, but voidable, and may be *abated*—not quashed.

I will conclude, by adverting to the wide field opened in these cases, if this objection can prevail. Where shall it stop? What the line of demarcation between cases to be considered contingent, and those not? The case of *Benson* is one where not only the *liability* is contingent, but where the plaintiff's *grievance* is contingent. Not so in this case: Andrews has received the consideration,

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and we have parted with it. Certainly, any case where the liability is primary, is not contingent. Apply this rule to cases of joint makers—of endorsers—against joint and several makers—against sureties, *where the plaintiff is the holder*—cases where endorsers are liable, only where the maker is prosecuted to insolvency—but where they cannot be found, (case under our statute where notes are not payable in bank,) and all cases where others are liable as well as the defendant, and where a party has a right of action against several at the same time for the same cause of action, as bills endorsed, and notes endorsed, and what will be the effect of this principle? It will prove very injurious to justice, and to the equal rights of all creditors;—they should all be upon the same footing. One creditor may acquire a lien on all a man's property, when the contract is *contingent in substance*, though not *in form*, to the exclusion of another, whose contract is absolute in *form*, but contingent in *reality*—which result was never intended by the statute.

Campbell, for the defendant in error.—The counsel for the plaintiff insists, that all obligations are contingent as to the question of payment, and because the statute permits an attachment to issue upon an obligation to which there is incident such a contingency, an attachment may issue upon all contingent liabilities.

The contingency in the question of payment, arises out of some conduct of the debtor. If he honestly fulfils the contract, payment will be made—but as the conduct he may maintain, renders the fact doubtful, (in certain

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specified cases,) security is afforded to the creditor, by allowing in advance the remedy by attachment.

The contingency in the "question of payment," arises out of none of the stipulations of the contract. Both parties contemplate certainty in the payment, and one party pledges fidelity in the performance of that act.

The contingency that we say renders this remedy improper, is, that the liability of the defendant may never exist. He may never owe the plaintiff one cent. The parties do not contemplate that he will owe the plaintiff. Whether he will owe the plaintiff, depends upon circumstances, still to intervene. Until they occur, there is no claim that the plaintiff is justly subject to.

The case of *Benson vs. Campbell*, (6 Porter's R. 445,) is express to this point. A party had become liable, as an accommodation endorser, on a bill of exchange. His liability was not certain—nor had he done any act to insure a claim against the defendant. But he was in a situation in which a liability might arise to pay the debt, and the defendant was proceeding in such a manner as rendered it probable that he would be compelled to do so.

But the court determined that the process of attachment rests upon no *quia timet* principle. There must be a direct contract, either matured and violated; or one the violation of which was rendered probable, to authorize its adoption. There must be an indebtedness at the time.

The same contingencies appear in this contract. A drawer of a bill is supposed to assign effects at the time for the payment of the bill. Whether he shall ever be called to do more than this, is uncertain. Whether he

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shall become liable to do more, is dependent upon the acts of others. These acts must be performed before his liability arises. The contingency of a further liability to the drawer, is as remote as that in the case of *Benson vs. Campbell*.

The facts stated by counsel, should have appeared in the affidavit, to justify the argument upon it. It is true, that a drawer of a bill may, at the time it was negotiated, give collateral instruments, that will render it a direct liability—or there may be circumstances that will convert a collateral into a direct liability. Those circumstances ought to be shown.

The old statute required that the affidavit should specify the nature of the debt—the account between the parties. If our present statute does not make the requisition, it has not changed the principle upon which the employment of the remedy depends—(3 *Stewart & Porter*, 67.)

COLLIER, C. J.—It has long been the most general practice in this State, to move to quash attachments in the manner in which the motion was submitted in the case at bar:—A practice suggested *ex majore cautela*, and originating doubtless, from an apprehension that an appearance as counsel, operates a waiver of all defects apparent upon the face of the proceedings—an idea, certainly without any foundation, either in law or reason.—And motions thus submitted have been entertained by our courts, under the impression that it was competent for them, *mero motu*, to repudiate a case commenced by attachment where the remedy was unauthorised; or the re-

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quisites of the statute were not complied with. In a case rendering it necessary, it might indeed be a matter of serious inquiry, whether a practice that has so long prevailed, should be held irregular, however much we might feel inclined to disregard it, were it *res integra*.

But the present case does not require us to consider the general powers of an *amicus curiæ*, for the record clearly discovers that several of the gentlemen who presented themselves before the County court in that character, had such an interest in the controversy, as authorised them to submit a motion to quash the attachment, issued at the suit of the plaintiff. They had been summoned as garnishees, to answer as to their indebtedness to the defendant, and at the time they made their motion, the motion of the plaintiff's attorney for a judgment by default, was pending before the court. So we think it clear, that at least several of the gentlemen who advocated the motion to quash, cannot be regarded as mere volunteers without an interest—and either one of them being authorised as a privy in interest, to point out defects in the proceedings, it is immaterial what is the predicament of the others.

The true inquiry, then, is, did the County court err in its judgment? The bond on which the attachment issued, does not correspond with the attachment. It recites the time when the court is to be holden, to be the *first Monday in June*, without designating it as *the next County court*, &c. If the condition of the bond contained these latter words, we will not say that they would not authorise the rejection of the former, viz. "*the first Monday in June next*," and the bond then be a sufficient com-

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pliance with the law; although this court, under its first organization, decided that a *capias ad satisfaciendum*, "returnable to the next term of the court, to be holden," &c. at a time not appointed by law, was absolutely void—(Brown *vs.* Simpson, 3 Stew. R. 331.)

In Lyon *vs.* Malone, (4 Porter's R. 414,) this court determined that a writ of error not showing the term of the Supreme court to which it was returnable, might be amended by its teste, or by the bond or citation;—that the time of its issuance being ascertained from either of these sources, the statute upon the subject ascertains the return to be the next succeeding term of the court. In the case before us, the statute is not so explicit on this point, but the court to which the proceedings are returnable, and the time when they are to be returned, is prescribed by the officer issuing the attachment, and must appear on the face of the proceedings—(Aik. Dig. p. 38, sec. 6.)

In Lowry *vs.* Stow, (7 Porter, 483,) the bond described the attachment as being returnable near two years previous to its issuance, and was considered by this court as defective.

The bond, then, was defective; yet the court should not, for that cause, have quashed the proceedings. This court has heretofore decided, under the influence of the seventeenth section, (Aik. Dig. p. 42,) of the attachment law, as revised in eighteen hundred and thirty-three, that a defective bond was not a sufficient cause for quashing the proceedings by attachment, unless the plaintiff declined executing a perfect bond—(Lowry *vs.* Stow, 7 Porter, 483; see also Pearsall & Stanton *vs.* Mid-

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diebrook, 2 Stew. & Por. R. 406; and Johnson *vs.* Hale, 3 Stew. & Por. R. 331.)

It is further insisted for the defendant, that the record does not disclose such a liability as will form the basis of an attachment—that the defendant may probably never become chargeable to the plaintiff—a fact which cannot be known, until after the protest of his bills for non-acceptance or non-payment; so that at most, his undertaking with the plaintiff is *contingent*.

In Benson *vs.* Campbell, (6 Porter's R. 455,) it was held that "under our attachment laws, a plaintiff must show that the defendant is indebted to him in a *sum of money past due*, or else in a *sum of money to be paid at a future day*." That "a possibility depending upon a contingency which may never happen—the dishonor of a draft, for the payment of which the defendant was a surety," could not be proceeded on by attachment. But neither the writ, affidavit or bond, inform us that the defendant's estate was attached to satisfy a contingent liability, and for any thing shown by either of these, the undertaking for which the plaintiff is seeking redress, is absolute.

The endorsement on the attachment, it is true, discloses the character of the plaintiff's demand—yet this cannot be regarded a part of the record, inasmuch as the law does not require the cause of action to be endorsed on the attachment. This point was brought directly to the view of this court, in Lowry *vs.* Stow, (7 Porter's R. 483,) and it is there shown that the act of eighteen hundred and seven, which makes it "the duty of the clerk, or plaintiff's attorney, to endorse on the back of the writ

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the cause of the action, the nature of the specialty, or the grounds on which the action is founded," as indicated both by its terms and its title, "applies to the initiatory process in a cause issuing from courts in which clerks are necessary officers." This decision still meets our entire approbation—and the endorsement not constituting a part of the record, affords no warrant for the judgment of the County court.

The only remaining question raised is, whether a corporation can, in any case, recover its debts by attachment. Our statute upon the subject enacts, that "original attachments, foreign and domestic, may be issued by any judge of the Circuit or County courts, or any justice of the peace." And further, that "every judge or justice, before issuing an attachment, shall require the party applying for the same, his agent, attorney or factor, to make affidavit in writing, that the person against whom the attachment is prayed, absconds," &c. "and shall further require the person applying for the attachment, his agent, attorney or factor, to swear to the amount of the sum due the plaintiff," &c.: "and shall further require the plaintiff, his agent, attorney or factor, to give bond payable to the defendant," &c. The same statute also provides, that "a writ of attachment may in all cases issue against the property of a debtor legally subject to the process of attachment, although the debt or demand of the plaintiff be not due," &c.—(Alk. Dig. p. 37, 39, s. 2, 3, 7.)

The right of a corporation to avail itself of the remedy by attachment, arose in *The Trenton Banking Company vs. Haverstick*, (6 Hals. R. 171.) The objection, there, was rested upon the ground that the law of New Jersey

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required the oath, in order to obtain the attachment to be made by the *applicant* for the writ, and hence it was argued, that inasmuch as an *artificial person* could not make an *affidavit*, the bank could not entitle itself to that remedy. But the court remarked, that "a construction of the act respecting attachments would be unsound and indefensible, and entirely inconsistent with the intention of the legislature, which should preclude a corporation from suing out a writ of attachment; as must be the result, if the act be so construed as to require the *affidavit* from the corporation itself, or to deny the use of the writ without such *affidavit*. The law which gives existence to the corporation,—which allows it to sue and be sued, necessarily confers the authority to perform by its agents, by whom alone it can act, incidental services like that in question."

Again, say the court: "In general, there is a manifest propriety in the making of such *affidavits* by the cashier, or president, or one of the acting clerks of the bank, because acquainted with the duties of their stations, with its pecuniary affairs, and of course with its creditors and debtors. But they are, and act in so doing, as the agents of the corporation."

The court consider the general right to sue and be sued, and so construe the statute of New Jersey, as to make the term "*applicant*," as far as corporations are concerned, not to inhibit the instrumentality of agents or attorneys.

Our statute expressly authorises the *affidavit* and bond to be made and executed by an agent, attorney, &c.; and the right to proceed by attachment, results from the

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incidental power and liability of suing and being sued, which pertains to all corporations, even at common law; unless taken away by positive enactment. The counsel for the defendant in error, conceding the justness of this reasoning and conclusion, argues that it has no application to banking corporations in this State—that the constitution, by declaring that “the remedy for collecting debts shall be reciprocal, for and against the bank”—(Section five, article on banks, of the constitution of Alabama,)—denies to the plaintiff the remedy by attachment. That inasmuch as the plaintiff cannot be subject to such a proceeding, to allow it to avail itself of it, would be a violation of the reciprocity intended to be secured by the constitution. This argument we think rather more specious than solid. With a view to the proper understanding of the constitutional provision, it may be well to consider the circumstances under which it was adopted.

In the charters of the Huntsville, St. Stephens and Mobile banks, (the only banks established previous to the organization of the State government,) these corporations were invested with power to proceed summarily against their debtors, and recover a judgment at the first term of the court, while a creditor of the banks was required to pursue the ordinary forms to collect his debt. To do away with such inequality, by subjecting the banks, as far as practicable, to the remedies they might employ, the provision we have cited, was made a part of the constitution. Its purpose was clearly to restrain the *legislature* from granting to banking corporations *exclusive facilities* in the collection of their debts. The attachment

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laws are general in their terms—offering to all alike, the benefit of their provisions, and operating upon all who place themselves in the predicament in which they *contemplate the debtor*. That the plaintiff, as an artificial person, never can *abscond*, is clear, and cannot, for *that cause*, be subject to an attachment; yet this does not depend upon any negative terms used in the statute, but results from the nature of the plaintiff's character. The proceeding in the present case, is intended as a substitute for the personal service of process; if the defendant appears and gives bail to the action, the writ of attachment becomes *functus officio*, and the case progresses as if it had been commenced in the usual manner. Now, as the plaintiff could not *abscond*, but must abide the ordinary procedure of the law, it is difficult to discover any foundation in justice for the defendant's objection. In fact, if an attachment was denied to the plaintiff, there would be plausibility in an argument, that by its denial, the plaintiff did not occupy ground in regard to the collection of its debts, as favorable as an individual creditor—while it was always in a condition to be sued, its debtors, by absconding, might escape its suits. We are clear in the opinion, that the constitution does not lend any aid to the defendant.

The argument, that *natural persons* are alone entitled or liable to the process of attachment, cannot be maintained. It is true, that the statute would seem to refer to such persons only, yet it is well settled, that the term "*person*," in a statute, embraces not only *natural*, but *artificial persons*; unless its language indicates that it was employed in a more limited sense, or the subject matter

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of the act leads to a different conclusion. So far as the case at bar is concerned, we can discover no reason for restricting the meaning of the legislature.

In the Bank of the United States *vs.* the Bank of North Carolina, (6 Pet. Rep. 29,) it was decided, that a corporation was a *person*, when placed in circumstances identical with those of a natural person—(s. p. The Farmers' Bank of Delaware *vs.* the Elkton Bank of Maryland, 12 Pet. Rep. 134, 135; and U. S. *vs.* Amedy, 11 Wheat. R. 392.)

It cannot have been supposed by the County court, that the defendant would have been without remedy, if the attachment was wrongfully or vexatiously sued out. If such an idea influenced its decision, it was clearly erroneous. The obligors in the bond would be bound to respond in damages, if the defendant was improperly aggrieved.

In examining the questions presented for our decision, we have not felt authorised to look into the declaration. Upon the motion to quash, it did not regularly come before the court. If it be variant from the writ, or defective in itself, the defendant's remedy is entirely different from that he has adopted.

In our opinion, the judgment must be reversed, and the case remanded.

GOLDTHWAITE, J., not sitting.

HOGAN vs. THORINGTON.

1. The action for a false warranty, is intended, not so much to punish the seller, as to compensate the purchaser for any injury he may have sustained.
2. And in such cases, the measure of damages is the injury sustained by plaintiff, in consequence of the false warranty.
3. Where one warrants a slave to be sound, which was not so—but who afterwards recovered and became sound—the measure of damages, is, the sums paid for medical attendance, nursing, &c. which induced the recovery.

Error to Montgomery Circuit court.

Case for a false warranty, tried by Judge *A. Martin*.

The defendant in error brought an action in the Circuit court of Montgomery, to recover damages of the plaintiff, for having falsely warranted to be sound, a negro woman, which he had previously sold to him. The case was tried on the *general issue*, when the jury found a verdict for the plaintiff, for three hundred and seventy-two dollars.

At the trial, the presiding judge sealed a bill of exceptions, at the instance of the plaintiff, from which it appeared "that the plaintiff (defendant in error) proved the unsoundness of the negro at the time of the sale, in February, eighteen hundred and thirty-three; and that at that time, she was not worth one half as much as she would have been if sound; that the price paid by plaintiff for said slave was five hundred and fifty dollars.

"It was further proved, that since the sale to plaintiff,

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negroes had greatly increased in price, and that the slave in question had apparently recovered from her unsoundness.

"The defendant proved, that the plaintiff sold said slave for one thousand dollars, without any warranty of soundness.

"The defendant moved the court to charge, that if the plaintiff had realized from the sale of said slave, a greater amount than the purchase money, and the interest thereon, he was not entitled to recover; which charge, the court refused to give, but charged the jury, that they could not take into consideration, the amount the plaintiff received; but that the true measure of damages was the difference between the real value of the slave, at the time of the warranty, and what would have been her value, if sound, with interest thereon. To which charge, the defendant excepted," &c.—and here assigned the same for error.

Campbell, for the plaintiff in error.

Robert D. Thorington, contra.

COLLIER, C. J.—The action for a false warranty is intended not so much to punish the seller, as to compensate the purchaser for any injury he may have sustained; and in order to a just admeasurement of damages, the proper inquiry in such a case is, what injury has the plaintiff sustained. The deterioration in value, by reason of unsoundness, or other defect, against which the defendant has stipulated, is only important, as furnishing a criterion of damages. What would be sufficient

to constitute unsoundness, and as such, a breach of the warranty, does not arise upon the record ; for it is admitted, that the slave was unsound at the time of the defendant's purchase. Yet the evidence shows, that she had recovered, so far as appearance indicated the state of health, and had been sold by the defendant at a large advance on his purchase. So that it would be obviously unjust to allow the defendant to recover damages, to the extent to which her value was supposed to have been impaired, by a disease, under which she labored at the time of his purchase, with interest on that sum ; unless he was placed in a situation so much more unfavorable than he would have been, had the slave been sound.—We think, both reason and authority would graduate the defendant's recovery by the injury he has suffered in consequence of the false warranty.—(Cozzins vs. Whitaker, 3 Stewart & Porter, 329 ; Weaver vs. Wallace, 4 Hals. R. 251 ; Egleston vs. Macauley, 1 McC. R. 379 ; Caswell vs. Coare, 1 Taunt. R. 566 ; 3 Starkie's R. 32.)

A plaintiff, in general, is entitled to recover for all losses resulting directly from a breach of the warranty ; so that, in some cases, he may recover even beyond the price he has paid for the thing warranted.—(Borradaile vs. Brunton, 2 Moore's R. 582 ; 8 Taunt. R. 535 ; Lightner vs. Martin, 2 McCord's R. 214.) Thus, the purchaser of a slave, warranted sound, who has proven *entirely valueless*, is entitled to be reimbursed, not only the purchase money, but all proper expenditures for medical aid, &c.

To apply this reasoning to the case at bar, if the slave (though unsound at the time of the defendant's purchase) has been restored to health, so that the only inconveni-

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ence or loss sustained by that unsoundness, was the expense and trouble incurred by the defendant in curing her, to that extent should be his recovery. It is not for the plaintiff to object, that the defendant has been amply compensated by the increased price at which he sold the slave. This resulted, doubtless, from the demand, and of consequence, enhanced value of such property in market, at the two periods of the defendant's purchase and sale. The unsoundness of the slave, when the plaintiff parted with her, contributed nothing to such a result; she would have been sold for as much by the defendant had she then been sound, and no expenditure of money by him would have been necessary. It is then, clear, that the defendant has sustained a loss, by the breach of the plaintiff's warranty; or rather, has been prevented from realising the profit he was entitled to, by so much as the sums paid for medical attendance, nursing, &c. diminished it; and for this loss, he is entitled to recover.

The consequence is, that the judgment must be reversed, and the cause remanded.

to constitute unsoundness, and as such warranty, does not arise upon the record, that the slave was unsound at defendant's purchase. Yet the evidence recovered, so far as appears, execution, one files his bill to enjoin health, and had been sold that he has off-sets—but alleging no variance on his purchase. or discovery of new facts—there is no just to allow the defendant jurisdiction of chancery can rest, and the extent to which it is impaired, by a bill in nature of a bill for a new trial at law, is never entered time of his purchase, and the aid of plaintiff's testimony—he must exhibit his he was pleased to shew a satisfactory excuse for neglecting it. than he We think a bill in nature of a bill for a new trial at law, is never entered defer

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Error to Wilcox Circuit court, exercising chancery jurisdiction.

Bill for injunction and discovery, tried before Crenshaw, J.

The plaintiff in error exhibited his bill on the equity side of the Circuit court of Wilcox county, alleging that the defendant had recovered a judgment against him, on which an execution had issued against his estate; and stating that the defendant, in the same character in which the judgment was obtained, was indebted to him in a sum larger than the judgment. The bill then prayed process of *injunction* and *subpœna*, until the matters of account could be adjusted in *equity*—both of which were awarded. The defendant was never served with *subpœna*; but Aaron Livingston, a party not named in the bill, or elsewhere upon the record, answered, by a gene-

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the allegations of the bill, and an averment only person interested in the judgment. In his answer the plaintiff filed several exceptions, all of which were disregarded by the Circuit Court, the injunction dissolved, and the bill dismissed.

The correctness of the proceedings of the Circuit court was questioned here by the assignment of errors.

Stewart, for the plaintiff in error.

COLLIER, C. J.—The first enquiry which presents itself, in considering this case, is, do the facts, disclosed by the bill, authorise the interference of equity.

The plaintiff does not inform us why he did not avail himself of his sets off, on the trial at law. If the omission resulted from his inability to prove them, without the aid of the defendant's testimony, it was certainly incumbent upon him to have exhibited his bill, previous to the judgment calling for a discovery, or else show a satisfactory excuse for having thus long neglected it.

Again: The bill is in the nature of a bill for a new trial at law, while it does not at all account for the plaintiff's neglect. Such bills are rarely entertained in equity—certainly never, where a party might have had the full benefit of a motion for that purpose, at law. No surprise on the trial—no discovery of new facts are pretended: there is, then, no basis on which the jurisdiction of chancery can rest. The cases of *Herbert & Kyle vs. Hobbs & Fennell*, 3 Stewart's Rep. 9; *Moore vs. Dial*, 3 Stewart's Rep. 155; and *McGrew vs. The Tombeckbee*

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Bank, 5 Porter's Rep. 547—are conclusive to show, that the bill is entirely wanting in equity.

It is immaterial to consider the regularity of Livingston's answer, or the exceptions to it, as the court very properly dismissed the bill. The decree is therefore affirmed.

THE STATE vs. WHITWORTH.

1. The act of fourteenth January, eighteen hundred and twenty-six, (Aik. Dig. 298,) is repealed by the act of eighth of January, eighteen hundred and thirty-six, (Aik. Dig. 2 ed. 624,) so far as the selection of grand jurors is provided for.
2. By the last mentioned act, it is made the duty of the clerk of the Circuit court, and of the sheriff, under the superintendence of the judge of the County court, to select from the whole number of persons qualified to serve on juries, twenty-four persons, best qualified in their opinion, to serve on the grand jury.
3. Therefore, a plea in abatement, framed with reference to the former act, and pleaded to an indictment, for exhibiting a gaming table, found since the passage of the latter, is bad on demurrer.
4. The act of eighteen hundred and twenty-eight, inhibiting gaming, covers the whole ground of the previous statutes, so far as the keeping, exhibiting, carrying on, or being in any manner interested in any gaming table or bank whatever, is concerned, and includes every offence connected with the subject matter.

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5. And as it provides a different, and in some respects, a milder punishment for these offences, than the previous statutes; it repeals them, so far as the same offences are provided to be punished by it.
6. A faro bank is within the words of the act of eighteen hundred and twenty-eight; and the words "gaming table," and "played with cards," in an indictment for keeping a faro bank, may be regarded as surplusage.
7. The statute provides, that it shall be sufficient for the indictment to charge, that defendant *did keep and exhibit a gaming table, or bank for gaming*, without averring or proving that money was won or lost or bet on such gaming table or bank.
8. Where it is proved under an indictment for exhibiting a faro bank, that defendant did exhibit a faro bank, without stating that the exhibition was for the purpose of gaming—it may be inferred that the exhibition was for that purpose.

Error to the Circuit Court of Tallapoosa.

Indictment for keeping and exhibiting a faro bank, tried before *Shortridge, J.*

The defendant was charged with keeping and exhibiting a gaming table, by an indictment, which was as follows:

"The State of Alabama, Tallapoosa county—Circuit court, October term, 1836. The grand jurors for the county of Tallapoosa, upon their oath present, that Richard W. Whitworth, late of said county, on the third day of October, in the year of our Lord one thousand eight hundred and thirty-six, in the county aforesaid, did keep and exhibit a certain gaming table, called a faro bank, played with cards, and kept for gaming, contrary to the

statute, and against the peace and dignity of the State of Alabama.

“G. D. SHORTTRIDGE, Solicitor of the
Eighth Judicial Circuit.”

The defendant pleaded two pleas in abatement, which were similar to each other, and alleged “that the grand jurors by whom the said indictment was found, were not selected by the Judge of the County court, the commissioners of roads and revenue, the clerk of the Circuit court, and the sheriff of the county, from the list of householders and freeholders, returned by the sheriff of Tallapoosa county, according to the provisions of the act,” &c. These pleas were demurred to by the State, and the demurrer sustained. The defendant then pleaded not guilty; was tried, convicted, and sentenced to pay the fine of one thousand dollars, and the costs of prosecution, and to remain in jail three months—without bail, and until the costs were paid.

At the trial, it was proved on behalf of the State, that the defendant exhibited a faro bank, in Tallapoosa county, within twelve months next before the finding of the bill of indictment.

The counsel for the defendant then requested the court to instruct the jury, that a faro bank was not a gaming table, as specified in the statute, and that it was incumbent on the prosecutor, to prove that the said faro bank was played with cards; which instructions were refused; and the jury were charged, that if they believed from the evidence, that a faro bank was exhibited (by the defendant) in the county of Tallapoosa, within twelve months next before the finding of the indictment, they

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should find the defendant guilty in manner and form as charged; and that they might regard the words 'gaming table' and 'played with cards,' as surplusage. At the request of the defendant, the questions of law arising on the pleas in abatement, the charge of the court, as refused, and the instructions given, were reserved as novel and difficult, under the statute, in order that the same might be determined by the Supreme court.

Attorney General, for the State.

GOLDTHWAITE, J.—The pleas in abatement seem to have been framed with a direct reference to the act of assembly, passed the fourteenth day of January, eighteen hundred and twenty-six, entitled 'an act for the better selecting, drawing and summoning jurors'—(Aik. Dig. 298.)

It is unnecessary to consider whether these pleas are formally pleaded, because at the time when this indictment was found, and when the grand jury must have been selected, a different mode than the one pointed out by the act of eighteen hundred and twenty-six had been provided by law, and this act, so far as it governed the selection of grand jurors, had been repealed—(Act of 8 Jan. 1836, Aik. Dig. 2 ed. 624.)

By the last enactment, it is made the duty of the clerk of the Circuit court, and of the sheriff, under the superintendence of the judge of the County court, to select from the whole number of persons qualified to serve on juries, twenty-four persons, best qualified, in their opinion, to serve on the grand jury," &c. The pleas in abatement, were therefore properly overruled.

The instruction to the jury, as well as those refused, involve the construction of the first sections of the acts of eighteen hundred and twelve, and eighteen hundred and twenty-six, and the fourth section of the act of eighteen hundred and twenty-eight, in relation to the offences of exhibiting gaming tables, &c.

The section of the act of eighteen hundred and twelve, is in these words: "If any person or persons shall be guilty of keeping or exhibiting any gaming table, commonly called A B C, or E O, or roulette, or rowley powley, or rouge and noir, or any faro bank, or any other gaming table of the same or like kind, or of any other description, under any other denomination whatsoever, or shall be in any manner, either directly or indirectly, interested or concerned in any of the aforesaid gaming tables, bank or games, either by furnishing money or other articles, for the purpose of carrying on the same, being interested in the loss or gain of the said table or bank, or employed in any manner in conducting, carrying on or exhibiting said table or bank. Every person so offending, and being convicted thereof in the Superior court of law and equity of the proper county, shall pay a fine of not less than five hundred dollars, and not more than two thousand dollars, and shall stand in the pillory three days in succession, one hour each day"—(Aik. Dig. 210.)

So much of the section of the act of eighteen hundred and twenty-six, as requires examination, is in these words: "And if any person or persons shall, after the passage of this act, by him or her, or themselves, or their agent, keep, or cause to be kept, any such table, bank, or

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other invention, by whatever name known or distinguished, for the purpose of gaming, or shall permit, or knowingly suffer the same to be kept, for the purpose aforesaid, on his, her, or their premises, he, she or they so offending, shall, on conviction thereof, upon indictment, be fined in a sum not less than five hundred dollars, nor more than two thousand dollars, and imprisoned not less than two, nor more than twelve months"—(Aik. Dig. 212.)

The fourth section of the act of eighteen hundred and twenty-eight, is as follows: "If any person or persons, shall hereafter be guilty of keeping or exhibiting any gaming table called A B C, or E O, or roulette, or rowley powley, or rouge and noir, or shall keep or exhibit any faro bank, or shall keep or exhibit any other gaming table or bank of the like kind, or of any other description, under any other name or denomination, or without any name therefor, or shall in any manner be interested or concerned in keeping, exhibiting or carrying on any such table, bank or game, each and every such person so offending, and being thereof convicted, shall be fined one thousand dollars, and on failure to pay the same, shall be imprisoned (without bail) for three months"—(Aik. Dig. 212:)

It may be somewhat questionable, whether the act of eighteen hundred and twenty-six, is as general and extensive as that of eighteen hundred and twelve; but the act of eighteen hundred and twenty-eight covers the whole ground of both the previous statutes, so far as the keeping, exhibiting, carrying on, or being in any manner interested in any gaming table or bank whatever;

and includes every offence connected with the subject matter, unless the furnishing of money or other things to carry on the same, without being in any manner connected by interest in the table, &c. is an offence intended to be punished by the act of eighteen hundred and twelve. As the act of eighteen hundred and twenty-eight provides a different, and in some respects, a milder punishment, for those offences, than the previous statutes, it must be held to repeal them, so far as the same offences are provided to be punished by it.

It cannot be doubted, that a faro bank is within the words of the act of eighteen hundred and twenty eight, and whether it be a gaming table or bank, is immaterial; both are equally within the inhibition of the statute, and the only matter to be ascertained by the jury, is the exhibition for the purpose of gaming.

The Circuit court properly refused to charge the jury, that a faro bank was not a gaming table; and it was correct in deciding, that the words 'gaming table,' in this indictment, as well as 'played with cards,' might be regarded as surplusage.

The sixth section of the act of eighteen hundred and twenty-eight, provides that it shall be sufficient for the indictment to charge, that the person indicted, *did keep and exhibit the gaming table or bank* above specified, *for gaming*, without proving that any money was won, or lost, or bet, on such gaming table or bank, &c. The indictment, in the present instance, contains substantially these averments, although they are coupled with the immaterial allegation, that the gaming table was played with cards, and if the evidence was sufficient to warrant

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the charge of the court, the judgment must be sustained.

The proof was, that the defendant exhibited a faro bank. It is not stated that the exhibition was for the purpose of gaming --but must not such purpose be inferred, from the ordinary meaning to be attached to these terms? We think it must. It would be absurd, to suppose that a faro bank can be exhibited for any other purpose. A different purpose would change the character of the exhibition, and it would cease to be a faro bank or gaming table.

There is no error in the decision of either of the questions referred to this court, and the judgment of the Circuit court is affirmed.

HOBSON & SONS vs. EMANUEL et al.

1. A written acknowledgment of service of a writ by a defendant, without proof of such acknowledgment, is not sufficient to sustain a judgment by default.
2. But where parties appear in court, the necessity of the actual service of process is dispensed with.
3. And an entry on the record, that the parties came by their attorneys, &c. is sufficient evidence of their appearance.
4. Where one of several defendants, sued as partners, pleads in abatement, and the jury find the issue for the plaintiffs, and judgment is rendered by the court, for the amount of the plaintiffs' claim, the defendants cannot object in error, on the rendition of judgment against all, on the issue formed upon the plea, the jury having found no damages.

Error to Perry Circuit court.

Assumpsit on two promissory notes, against Baker Hobson, Nicholas Hobson and China Hobson, copartners, trading under the firm and style of B. Hobson & Sons. The service of the writ was accepted by defendants in the following words endorsed on the writ:

"We do hereby acknowledge legal service of the within
—this 28 Sept. 1836. B. HOBSON & Sons."

To the declaration, Tescharner D. Hobson, who had been sued jointly with Baker and Nicholas Hobson, merchants, &c., in his own person, came and said that he was named and called Tescharner D. Hobson, and *absque hoc* that he never was called China, which he was ready to verify, and prayed judgment, and that the writ might be quashed, &c. Plaintiffs replied that Tescharner was often called Chiner, as the name of Tescharner.

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And at Spring term, eighteen hundred and thirty-seven, came the parties, by their attorneys, and likewise came a jury, who said they found the issues for the plaintiffs. It was therefore considered by the court, "that the plaintiffs the sum of twenty-five hundred and fifty-four dollars, the damages in the plaintiff's declaration mentioned, and also their costs of suit in this behalf expended, for which execution," &c.

And at Fall term, eighteen hundred and thirty-eight, came the plaintiffs, *by their counsel*, and moved the court for direction to the clerk, to amend a clerical error of the Spring term, eighteen hundred and thirty-seven, of the court, so that judgment might be rendered *nunc pro tunc*, that the jury find the issues in favor of the plaintiffs, and assess their damages, &c. The motion was granted, and it was considered that execution might issue, &c.

To reverse the judgment, a writ of error was sued out. The following errors were assigned:

1. It does not appear that legal service of the writ was ever made upon defendants—or that they were in court.

2. The court erred in rendering judgment against all the defendants to the action for the damages, when the only issue was upon the plea in abatement filed by one defendant, and the jury having assessed no damages.

Parter, for plaintiffs in error.

Phelan, contra.

GOLDTHWAITE, J.—If the judgment of the Circuit court was supported only by the acknowledgment of

service, this, without proof, would be insufficient to sustain it, as decided by this court in *Welch vs. Walker & ux.* (4 Porter, 120;) but it is disclosed by the record, that at the trial term, "came the parties, by their attorneys, and thereupon came a jury," &c. Similar entries have been held sufficient evidence of the appearance of parties, and to dispense with the necessity of actual service of process—(*Gilbert vs. Lane*, 3 Porter, 367; *Lucy et al. vs. Beck*, 5 Porter, 167.) The first assignment is therefore not supported by the record.

The second assignment can avail nothing. One of the defendants to the action, alone thought proper to contest the suit, and his defence did not extend to the merits of the cause. After the determination of the issue on the plea in abatement, the action remained wholly undefended; and, although it would have been more regular, to have entered a formal judgment of *nil dicit*, yet there is no substantial error in that which was rendered. It was the privilege of the plaintiff to insist, that the jury should assess his damages, when they ascertained the issue in his favor, but the omission to do so, gave the defendants no rights, or if they were thereby placed in a condition to plead to the merits, they have not done so, and as no defence was interposed, after the determination of the only issue before the jury, the court properly rendered judgment for the amount due on the notes.

The amended judgment is not attempted to be made the subject of revision, and notice of it is therefore unnecessary. Let the judgment be affirmed.

Adams et al. vs. M'Millan.

• ADAMS et al. vs. M'MILLAN.

1. The inference usually expressed in a declaration on a promissory note, "by means whereof," &c. is supplied by a statement of a promise to pay the note according to its tenor and effect.
2. The omission to insert an allegation, that defendant is liable to pay the note, is not a matter of substance, to be reached by general demurrer, or on error.
3. A promissory note is, *in itself*, a legal liability, and needs no distinct substantive allegation in the declaration, to entitle a plaintiff to recover, apart from a description of the note, and an allegation of non-payment.

Error to the Circuit court of Dallas.

Assumpsit on promissory note, tried before *Pickens*, J.

The plaintiffs in error were sued in *assumpsit*, on a promissory note, in the Circuit court of Dallas, and judgment by default rendered against them. The only error relied on was, that "the declaration is defective, in not stating a legal liability."

Gayle, for plaintiffs in error.

Edwards, contra.

COLLIER, C. J.—The declaration, after setting out the promissory note, its delivery, &c. proceeds thus: "and said defendants then and there, in consideration of the premises, promised to pay the money specified in said note, to said plaintiff, according to the tenor and effect thereof, yet said defendants have not paid," &c.

It is objected, that this statement of a promise is not sustained by the inference usually thus expressed: "by means whereof, &c. the said defendants then and there became liable to pay to the said plaintiff, the said note specified, according to the tenor and effect of said note." This allegation is inserted in most forms of declarations, where the action is against the parties primarily liable, as the *maker* of a note or acceptor of a bill; and though it may have been considered a formal allegation, the omission of which would be bad on special demurrer, it is clear, that it is not a matter of substance, to be reached by a general demurrer, or on error.

The promissory note is *in itself* a legal liability, and needs not a distinct substantive allegation to entitle a plaintiff to recover, apart from a description of the note, and an allegation of non-payment, &c. in the declaration—(Bayl. on Bills, 112, 362, note 1; Starkie vs. Cheeseman, Carth. 510, S. C.; Salk, 128; Anon. Hardre's Rep. 486; Bacon's Ab. *tit. assumpsit*, F.; 1 Taunt. R. 217; act of 1812, Aik. Dig. 328; act of 1811, Aik. Dig. 283.)

There is no error in the record, and the judgment is affirmed.

The State vs. Garner.

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THE STATE VS. GARNER.

1. The statute makes the value of property, maliciously injured or destroyed, the basis of the verdict under an indictment; and permits the jury to go to the extent of four fold its value; and the fine thus assessed is for the benefit of the injured party.
2. An indictment, therefore, for maliciously injuring or destroying property, should contain an averment of the value of the property injured or destroyed.

Error to the Circuit court of Montgomery.

Indictment for malicious mischief, tried by Judge A.

Martin.

This was an indictment against the defendant, for malicious mischief, in killing a mare, the property of one Henry Cannon.

Issue being joined on the plea of not guilty, the jury found a verdict against the defendant, of two hundred dollars.

A motion was made in arrest of judgment, on the ground that the value of the mare charged in the indictment to have been maliciously killed by the defendant, was not averred in the indictment; which motion, the court overruled, but reserved the point for the revision of this court, as one of novelty and difficulty.

Attorney General, for the State,

ORMOND, J.—The statute on which this indictment is founded, is to the following effect:

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"From and after the passage of this act, any person or persons, who shall unlawfully, maliciously and wilfully, kill, wound, or disable any horse, mare or gelding, colt or filly, jack, jennet or mule, or any goat, sheep or cattle, or any hog, or live stock, of any kind or description whatever, belonging to any other person or persons, or shall, &c.; every person or persons so offending, shall, on conviction of any of the aforesaid offences, by sufficient and satisfactory testimony, in any Circuit court having jurisdiction of the same, be fined in such sum as the jury trying the same may assess, not exceeding four fold the value of the property injured or destroyed, and imprisoned in the common jail of the county, any length of time, at the discretion of the jury trying the case; which fine shall be paid to the party injured."

In indictments for larceny, it is necessary to allege the value of the property stolen; not only to designate whether the offence is grand or petit larceny, but also because the owner is entitled to restitution, of the value of the goods stolen, if the goods themselves cannot be had. It would seem that the same reason would hold in this case. The statute makes the value of the property maliciously injured or destroyed, the basis of the verdict, and permits the jury to go to the extent of four fold its value; and the fine thus assessed, is for the benefit of the injured party.

It is, therefore, a *quasi* civil proceeding, prosecuted by the State for the benefit of the person whose property has been thus maliciously injured or destroyed, and it would be more consonant to the rules of pleading, and to the principles which govern analagous cases, that the

Sims vs. the adm'r of Sims.

Indictment should contain an averment of the value of the property. For this defect, the judgment should have been arrested. The judgment of the court below is therefore reversed.

SIMS vs. THE ADM'R OF SIMS.

1. Delivery of possession is an essential ingredient in a gift of personal property, but a *change of possession* is not indispensable.
2. Every delivery of a chattel, with intent to give it to another, operates a *legal change of possession*, and transfers dominion over the subject of the gift to the donee.
3. The fact that a slave given by a parent to a child remains at the residence of the donor, may be explained by the circumstance, that the residence of the donor is also that of the donee.
4. And is a proper subject for the consideration of a jury, when enquiring into the truth and reality of the gift.

Error to the Circuit court of Dallas county.

Detinue for slaves, tried by *Harris, J.*

The action was detinue, brought by the plaintiff in this court. On the trial, in the court below, a bill of exceptions was tendered to the opinion of the court, from which it appeared that it was in evidence before the jury, that B. Sims, the father of the plaintiff, at a public sale, at his house, in the presence of several persons, called the negro girl, Rachel, (now in dispute,) and the plaintiff,

before him, in the yard, and called on the persons present, to witness that he gave said negro to the plaintiff.

It was also in proof, that the negro had been previously sold, to one of the persons present, which contract was rescinded at the instance of the father, to enable him to make the gift to the plaintiff.

It was further proved, that after the gift, the negro girl and the plaintiff remained together, the former in the possession, and the latter in the family of B. Sims, her father, until his death. After the death of B. Sims, the said negro girl and her child were taken possession of by the defendant, as administrator of B. Sims, in whose possession they now remain.

Upon this evidence, the court charged the jury, that a delivery and change of possession was absolutely necessary to the validity of a gift, and if the jury believed there had been no such change of possession, the gift was absolutely void, and it was their duty to find for the defendant. This charge was excepted to.

There was a verdict and judgment for the defendant, from which the plaintiff prosecuted a writ of error, and now assigned for error the charge of the court.

J. B. Clark, for plaintiff in error.

Edwards, contra.

ORMOND, J.—It is desirable, that in all cases presented to this court for revision, the points intended to be raised, should be distinctly presented on the record, so as to leave no room for doubt or misconstruction. In this case, although the point is not presented so clearly

Sims vs. the adm'r of Sims.

as is desirable, yet we think from the context, we can arrive at it with reasonable certainty.

The charge of the court must be considered in connection with the evidence, and thus considered, there can be no doubt that the jury were misled by it.

It is certain that delivery of possession is an essential ingredient in a gift of personal property. But when the court charged "that a delivery and *change of possession* was absolutely necessary to the validity of a gift, and that if there had been no such *change of possession*, the gift was absolutely void;" the jury were authorised to infer, and no doubt did infer, that the gift was invalid, even if the *delivery* was proved, because the negro afterwards remained with her former master. The gift was complete at the instant of delivery, and if any argument had been urged against the fact of delivery, because the slave remained with the donor, her former master, the court should have left it to the jury to determine whether that circumstance was not explained, by its being also the home of the donee. This, we think, the jury were precluded from doing, by the emphasis which the court seem to have given to the fact of *possession* in addition to delivery, as being necessary to constitute a valid gift.

The cases of Goodwin vs. Morgan, (1 Stewart's Rep. 278,) and Frisbey and wife vs. McCarty (1 Stew. & Por. 56,) do not militate, in the slightest degree, against the principles here laid down. The term "change of possession," is a mere paraphrase of the word delivery; for every delivery, with intent to give, operates a *change of possession*, and transfers dominion over the subject of the gift to the donee. What facts or circumstances would in

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law amount to a *delivery* of personal property, so as to consummate a gift, is a question we are not called on to determine.

The judgment must be reversed, and the cause remanded for a new trial, not inconsistent with this opinion.

FINDLEY et al. vs. RITCHIE.

1. Process must be construed in reference to the law which provides for its issuance and return.
2. The act of eighteen hundred and seven, (Aik. Dig. 278,) provides, that where a writ is issued five days before court, it is regularly returnable to the next term; and it makes a writ abateable, if it be returnable at a term beyond that next to be holden.
3. A writ issued on the third of January, eighteen hundred and thirty-eight, and returnable on the fourth Monday in January *next*, is not illegal; and the word *next* in the writ, may refer to the *fourth Monday next after its date*, and not to January, eighteen hundred and thirty-nine.

Error to the County court of Wilcox.

Assumpsit on promissory note.

In this case, the County court of Wilcox, on motion of the defendant's attorney, at the term holden in January, eighteen hundred and thirty-eight, quashed the plaintiffs' writ, which was issued on the third day of January, eighteen hundred and thirty-eight, and made returnable in its body, as follows: "before the honorable the County court, to be holden for Wilcox county, at the place of

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holding said court, on the fourth Monday in January next."

The only question raised upon the record, was, whether the word "next," referred to January, eighteen hundred and thirty-nine, or to *the fourth Monday next after the date of the writ.*

COLLIER, C. J.—By an act passed as early as 1807, (Aik. Dig. sec. 111, p. 278,) it is enacted, that all process "in any court of the territory, (except *subpœnas* for witnesses, which in term time may be made returnable immediately,) shall be issued by the clerk of such court, and shall be returnable to the first day of the term, and shall be executed at least five days before the return thereof; and if any person shall take out any writ or process while such court is sitting, or within five days before the beginning of the term, such writ or process shall be made returnable to the term next after that then held, or to be held within five days as aforesaid, and not otherwise: and all writs of process, issued, made returnable, or executed in any other manner, or at any other time, than is herein before directed, may be abated on the plea of the defendant."

This statute makes abateable, the writ in the case at bar, if it be returnable at a term of the County court, beyond that next to be holden. If the question were *res integra*, we should not consider it one of any intrinsic difficulty, yet it has been so greatly perplexed by the opposing opinions of learned judges, that we have felt not a little embarrassed in striking out a course satisfactory to ourselves.

In *Bunn vs. Thomas & King*, admirals, (2 Johns. R. 190,) a question somewhat analogous was raised. There a writ was issued, bearing teste the *twelfth day of May, eighteen hundred and six*, and made returnable on the *seventeenth day of May next*. It was contended, that as the writ was returnable in May, eighteen hundred and seven, it was absolutely void; and so the court decided. (To the same effect, is 1 Danlap's Prac. 117, 140; and *Burk vs. Barnard*, 4 Johns. R. 39.)

But *Scott vs. Adams*, (12 Wend. R. 218.) a later decision of the same court, than the cases cited from *Johnson*, we think in direct conflict with them, and of consequence, overrules them. In that case, a *copias* was tested on the *seventh day of July, eighteen hundred and thirty-four*, made returnable on the eighth day of July next; a motion was made to set it aside, on the assumption that more than a term intervened between its teste and return. The court denied the motion, and held that the "*eighth day of July next*," should be read "*eighth day of July next after the seventh day of July*," the teste of the writ. Thus stands the question, upon the authority of foreign courts, so far as we have had access to them.

Commencing with the decisions of our own State, to which we have been referred, the case of *Wallace vs. Hill*, (Ala. Rep. 70,) is first in the order of time. There, the point was not as to the validity of process in the cause, but whether a promissory note, dated the *fourth day of December, eighteen hundred and twenty*, and payable "*on or before the twenty-fifth day of December next*," was due in eighteen hundred and twenty, or in December, eighteen hundred and twenty-one. The court say,

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the most usual and known signification of the terms employed defer the period of payment to the twenty-fifth day of December, in the year next succeeding the date of the note. This decision is clearly correct, yet we cannot perceive its analogy to the present case. Language must be interpreted according to the subject matter in respect to which it is used. It was entirely competent for the parties to have prescribed such time as they could agree on, for the performance of their contract, and there was nothing extrinsic to which the court could refer to ascertain its meaning. Now, it is confessedly true, that the term *next*, in the connection in which it is found in the note, must, according to the *most usual and known signification of the terms*, mean the twenty-fifth day of the *next December*, that is, December, eighteen hundred and twenty-one. In the case before us, the writ must be construed in reference to the law which provides for the issuance and return of process. That law, as we have seen, directs that where a writ is issued more than five days before court, it is regularly returnable to the next term, and if it *be made returnable* to a more distant term, it is abateable on plea by the defendant. Now, as the writ can only be regular, upon the hypothesis that the word *next* refers to the *fourth Monday next after the third day of January, eighteen hundred and thirty-eight*, we should so interpret its meaning; unless in doing so, some rule of construction would be thereby violated. It is a rule in grammar, that "the antecedent bears relation to what next follows, unless it destroys the meaning of the sentence." By connecting *next*, with its antecedent, *January*, the meaning of the sentence, it is true, is not destroy-

ed, but the process itself is made inoperative, a result which we think may be avoided by a due regard to the subject matter, without disregarding any settled principle.

In *Gibson vs. Laughlin*, (Ala. Rep. 182,) the writ issued on the second day of September, eighteen hundred and twenty two, and returnable to the "next Circuit court to be held," &c. "on the first Monday after the fourth Monday in September next." The court say, "At most, the term used, viz. 'September next,' is one of double import: The return of the writ is susceptible of being rendered sufficiently certain, by a reference to its date and the time of service."

But in the *Bank of Mobile vs. the State*, (Ala. Rep. 290,) where a notice was issued on the sixth day of March, eighteen hundred and twenty-four, returnable "on the second Monday after the fourth Monday in March next," the court held, that the notice was defective, as being returnable to a term of the court beyond the one next succeeding its issuance.

In *Brown vs. Simpson*, (3 Stewt. Rep. 331,) a *capias ad satisfaciendum* appeared to have issued on the first day of November, eighteen hundred and twenty-seven, returnable to the *next term* of the court, to be holden on the first Monday in January, eighteen hundred and twenty-seven. And the court, by a bare majority, determined that the process was void, because it was returnable previous to its teste. This case, it may be remarked, is unlike the present; the decision did not depend upon the interpretation of terms, yet it cannot be sustained; and the court should have considered the words "next term

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of the court," as controlling the time expressed for the return of the *ca sa*, and held it to have been then returnable.

And in *Lyon vs. Malone*, (4 Porter's R. 414,) it appeared that a writ of error, sued to this court, expressed on its face no time for its return. On motion to quash, the court said that the statute prescribing that it shall be returnable to the first day of the next term after its issuance, makes it thus returnable, and overruled the motion.

We have felt it due to ourselves, though the question is one seemingly of but little importance, to review the authorities cited at the argument, that it may be seen that our conclusion is the result of deliberation. The decisions of our own State, as well as those of others, are contradictory, and some of them, directly the opposite of each other. In such a state of things, we feel licensed to consider the question open to the operation of our own judgments, under the guidance of principle; and following the rules most approved by reason for the interpretation of language, we cannot doubt the legality of the *writ*, for the reasons already stated. We lay no stress upon the fact, that the judgment of the County court is rendered on a motion to quash, instead of putting the defendant to his plea in abatement—as in either form, it would be alike indefensible.

The judgment is reversed, and the case remanded.

Bourne vs. the State.

BOURNE VS. THE STATE.

1. The clerk of the Circuit court has no authority to issue writs of error in any criminal case; such writs must originate from an application to the Supreme court.
2. And a writ thus improvidently issued, will be dismissed.
3. The Circuit courts are prohibited from referring any question of law to the Supreme court, except such as are novel and difficult.
4. A bill of exceptions was not allowed at common law.
5. Where no intention to refer a case to the Supreme court, is apparent on the record—it must, *pro defectu*, be repudiated.

Error to the Circuit court of Mobile.

Indictment for issuing a change bill, tried before *Pickens, J.*

The indictment charged plaintiff in error, and one Williams, with having “made a promissory note, and put forth the same as a change bill, as follows, to wit:

12½	The Cheap Variety Store, corner of Govern-
	ment & Royal st's, near the Market—Mobile, Dec. 2d, 1837.
No. 79—B.	I O U
Twelve and a half cents, in current money of the city.	
I certify, <i>G. W. Williams.</i>	BOURNE.

contrary to the form of the statute,” &c.

To the indictment, defendants demurred; which being overruled, they plead not guilty. Bourne was convicted,

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and Williams acquitted. To reverse the judgment against Bourne, a writ of error was sued out.

A bill of exceptions was taken at the trial, the points contained in which, are set forth in the assignment of errors.

The errors assigned were :

1. That the indictment being on an instrument executed by two, the number of the parties, was a material point in the description of the instrument—and the finding one not guilty, rendered the instrument improper evidence as to the other : and so the court should have instructed.

2. That the paper having the name of Williams to it, as a subscribing witness, its execution could not be properly proved by any one else ; without the usual showing for dispensing with a subscribing witness.

3. The court should have charged the jury, as requested, to acquit the defendants, if they were satisfied that the paper offered in evidence did not correspond with that described in the indictment.

4. That the court erred in its charge to the jury, that they were authorised to infer the offence was committed in Mobile county, upon the paper offered in evidence alone, &c.

Aiken, for plaintiff in error.

Attorney General, contra.

PER CURIAM. The clerk of the Circuit court has no authority to issue writs of error, in any criminal case : in all such, the writs must originate from an application

to this court—(Lynes *vs.* the State, 5 Porter, 236.) As the writ has improvidently issued, it must be dismissed.

On looking into the record, we do not find that any points were reserved, under the statute, as novel and difficult, for the revision of the Supreme court. It is true, a bill of exceptions was signed and sealed by the presiding judge, but the statute prohibits the Circuit courts from referring any question of law, except such as may be novel and difficult; (Aik. Dig. 257)—and this court determined, in the case of Ned *vs.* the State, (7 Porter 187) that at common law, a bill of exceptions was not allowable.

In the case of the State *vs.* Prince, (3 Stew. & Porter, 253,) it is said "this court will not be particular as to the manner in which the questions are referred, if the intention to refer be shown in the record." No such intention appears, and the entire case must be repudiated.

The State *vs.* Hawkins.

THE STATE *VS.* HAWKINS.

1. In larceny, the criminal intention constitutes the offence, and is the only criterion by which to distinguish a larceny from a trespass.
2. To constitute larceny, it is not sufficient that the goods be taken for the purpose of destroying them; as, if one take the horse of another, for the purpose of destroying him, to injure his neighbor—and should destroy him—this would be malicious mischief, but not larceny.
3. Where a defendant assisted in secreting a slave, to the end that she might escape from her master, and obtain her freedom, but there was no intention to convert the property to the use of the defendant—an indictment for larceny could not be sustained.

Error to Mobile Circuit court.

Indictment for stealing a slave, tried by Judge *Pickens*.

This was an indictment found against the prisoner, in the Circuit court of Mobile county, for stealing a slave.

There was a verdict against the prisoner, on the plea of not guilty, and judgment pronounced against him.

On the trial of the cause, a bill of exceptions was taken, which was as follows: "Be it remembered, that on the trial of this cause, it was proven on behalf of the State, that the defendant had taken the negro slave, Jane, out of the possession of her master, and had attempted to place her on board a certain vessel called the brig *Martha*, then just about sailing for a northern port, with a view of enabling said slave Jane to secure her freedom, by going to a free, or non-slaveholding State.

It was further proven in behalf of the State, that ha-

ving failed to find the girl Miss Martha, (which had dropped down the river) on account of the darkness of the night, and the density of the fog,—the defendant concealed in the fore-cabin of the schooner *Helipse*, (on which he was carrying the girl slave Jane, for several days, for the purpose of enabling her to make her escape to a free, or non-slaveholding State.

The judge charged the jury, that if the evidence satisfied them that the taking and carrying away, was with the motive of taking the slave to a free State, that she might enjoy freedom, such motive was sufficient to constitute larceny.

The question of law arising out of the evidence, and the charge of the court, was by the judge referred to this court, as novel and difficult.

Attorney General, for the State.

ORMOND, J.—The judgment, in this case, is founded on a statute of this State, to be found in Aiken's Digest, 103, sec. 19. "If any person or persons, shall steal any negro or mulatto slave whatsoever, out of, or from the possession of the owner or owner of such slave, the person or persons so offending, are hereby declared to be felons, and shall suffer death."

The single question presented by the record, is, whether the facts given in evidence on the trial in the court below, and from which, under the instruction of the court, the jury found the prisoner guilty, were sufficient to warrant his conviction on this indictment, for *stealing* the slave therein mentioned.

The State vs. Hawkins.

The evidence establishes the fact beyond all doubt, that the prisoner did not intend to convert the negro to his own use, but that the taking was to enable her to make her escape to a free State; upon which the court charged the jury, that if the motive of the prisoner, in taking the slave, was to enable her to escape to a free State, that she might enjoy freedom, such motive was sufficient to constitute larceny.

We will proceed to examine whether a larceny can be committed without the *animus furandi*; the intention to convert the subject of the larceny to the use of the taker.

Blackstone defines larceny to be the "*felonious taking and carrying away the goods of another*"—(4th Book, 230.) This taking and carrying away, he says, must also be *felonious*; that is, done *animus furandi*; or, as the civil law expresses it, *lucri causa*. It is also thus defined by Lord Coke, in his Institutes, and by Hawkins, in his Pleas of the Crown—(1 Hawk. 93.)

This definition has been objected to, as not being sufficiently certain,—the word *felonious* itself, requiring a definition; and Archbold submits the following: "Larceny, as far as respects the intent with which it is committed, (and the intent here, is a material part of the offence,) may perhaps be correctly defined thus: where a man knowingly takes and carries away the goods of another, without any claim or pretence of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use." And Chief Justice Eyre, in Pears' case, defined the offence thus: "The wrongful taking of goods, with intent to spoil the owner of them, *lucri causa*."

It is apparent from the definition, and is so expressly laid down in the books, that the criminal *intention* constitutes the offence, and is the only criterion by which to distinguish a larceny from a trespass. According to this definition, to constitute the offence, it is not sufficient that the goods be taken for the purpose of destruction, as, if one should take the horse of another, for the purpose of destroying him, to injure his neighbor, and should destroy him, such an offence would be punishable as malicious mischief, but it would want one of the essential ingredients of larceny, the *lucri causa*,—the intention to profit by the act—by the conversion of the property.

This is the ancient doctrine of the common law, but it has been recently called in question by several decisions made by the English Judges, which will be now noticed, as it was probably under their influence that the decision of the court below was made.

In the case of the King *vs.* Cabbage, (Russel & Ryland, 292,) a prisoner, to screen his accomplice, who was indicted for horse-stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal pit, and killed; and it was objected at the trial, that this was not larceny, because the taking was not with an intention to convert the horse to the use of the taker, *animus furandi et lucri causa*; seven of the judges held that it was larceny, and six of that majority were of opinion, that to constitute larceny, it was not essential, that the taking should be *lucri causa*, if it be fraudulent, and with intent wholly to deprive the owner of his property. But some of this majority thought that the object of the prisoner might be deemed a benefit and the taking, *lucri causa*.

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Also, in the case of the King vs. Morfet and others, where the prisoner's servants in husbandry, opened the granary of their master, by means of a false key, and took thereout two bushels of beans to give to their master's horses, in addition to the quantity usually allowed; this was held larceny, by a majority of the judges; but it was alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, and therefore, the *lucri causa*, to give themselves ease, was an ingredient of the offence.

It appears to us, that these cases cannot be considered authority in this country. The shadowy, and almost imaginary distinctions upon which they rest, are at war with that precision and certainty which is the boast of the criminal law of England. It is also to be remarked, that they are decisions made by a bare majority of the judges; and of that majority, a considerable portion, for reasons, it is true, which do not seem entitled to much weight, held that the *lucri causa* was present in those cases.

In the case at bar, it is very clear, that the intention was apparent to do the owner of the slave an injury, by depriving him of his property; but we cannot see how the prisoner was himself to be benefitted, by aiding the slave to obtain her freedom. There being, therefore, no intention to convert the slave to his own use,—he cannot, from the view we take of the case, be found guilty of larceny.

We are greatly strengthened in the view we have taken of this case, from the legislation of the slaveholding

The State *vs.* Hawkins.

States on this subject. In the States of Kentucky, South Carolina, North Carolina, and, as we are informed, in other slaveholding States, the crime of taking a slave, without the consent of the owner, with intention to convey him beyond the limits of the State, is specially provided for, in addition to penal enactments for stealing a slave. We are, therefore, of opinion, that the indictment, in this case, for stealing a slave, cannot be supported, on the evidence contained in the bill of exceptions.

The judgment of the court below, is therefore reversed; but the prisoner is to remain in custody, until the next term of the Circuit court, to be held for the county of Mobile, unless delivered therefrom, by due course of law, to enable the solicitor for that judicial circuit, to prefer an indictment against him for harboring or concealing the slave Jane, in this indictment mentioned, or for a conspiracy to deprive the owner of the said slave of his property.

Moore vs. Philips.

MOORE vs. PHILIPS.

1. Where a defendant appears in court by an attorney, it is immaterial whether the process was served or not: an objection arising from a defective service of process, is waived by a *general appearance*.
2. Where the record discloses, that the parties came by their attorneys, and judgment by default was taken, not because of defendant's non-appearance, but for an omission to plead, an objection that defendant was not legally served with process, will be unavailable.

Error to the Circuit court of Monroe.

Assumpsit on note, tried before *Shortridge, J.*

On the the twenty-sixth of September, eighteen hundred and thirty-six, the defendant in error caused to be issued against the plaintiff, from the clerk of the Circuit court of Monroe, a writ in usual form, with a cause of action thereon, endorsed in these words:

"This action is founded on an instrument in writing, of which the following is a copy: 'on the first day of January next, I promise to pay John Phillips, or bearer, the sum of one hundred and fifty dollars, for value received. November 20th, 1835.

(Signed,)

J. W. MOORE."

On which the plaintiff made the following acknowledgement and agreement: "I acknowledge service of this writ, and agree that it shall not be placed on the appearance docket, at October term, but shall be placed on the trial docket, and stand for trial at the March term, 1837. September 27th, 1836. JOHN W. MOORE."

Moore vs. Phillips.

At March term, eighteen hundred and thirty-seven, the following entry was made in the case: "This day came the parties, by their attorneys, and the plaintiff claims judgment by default final, for want of a plea; whereupon, there being no plea filed within the time limited by the rule of court, and the statute in this behalf,—it is therefore considered by the court now here, that the plaintiff do recover," &c.

* *Porter*, for plaintiff in error.

Stewart, contra.

COLLIER, C. J.—The only error relied on, is, that there is no evidence of the service of process on the plaintiff in error, to authorise the judgment rendered against him.

In *Welch, adm'r, vs. Walker and wife*, (4 Porter's R. 120,) it was held, that an endorsement upon a writ of an acknowledgment of service, without proof that it was the act of the party purporting to have made it, would not sustain a judgment rendered against a defendant, who did not appear in the case. That case, however, is not decisive of the one at bar; for here, the record expressly discloses, that the parties came by their attorneys, and that the judgment by default was not claimed because of the defendant's non-appearance, but for his omission to plead. The plaintiff in error, then, having appeared in court, by attorney, it is immaterial whether process was served or no, as it is waived by a *general appearance*. (See *Hobson & Sons vs. Emanuel & Gaines*, at this term.) The judgment is affirmed.

Gaston vs. Parsons.

GASTON VS. PARSONS.

1. A return of "*not found*," to a writ, does not authorise the inference, that the suit is abandoned by the plaintiff.
2. A plea in abatement, that a suit was pending for the identical cause of action, at the time of the issuance of the writ, is supported by the production of the record; and the replication to such a plea should present the issue of *nul tiel record*.
3. A writ, as part of the record, is proper and pertinent evidence to support such a plea, on an issue of *nul tiel record*.
4. A defendant is entitled to judgment of *non pros*, where no replication is filed to his plea in abatement.
5. And a failure, on his part, to move for judgment of *non pros*, does not authorise the rendition of judgment against him.

Error to Wilcox County court.

Assumpsit on note.

In this case, Gaston was sued by Parsons in the County court of Wilcox county, and pleaded the pendency of another suit for the same cause of action, in abatement. No replication or issue appeared on the record. The judgment entry stated: "this day came the parties, by their attorneys, and the plaintiff has leave to dismiss his suit in the Circuit court; and the defendant sayeth nothing further in bar or in preclusion of the plaintiff's right of action, but against the plaintiff leaves himself wholly undefended; it is therefore considered by the court, that the plaintiff recover of the defendant the sum of,"—then proceeding to assess the damages without the intervention of a jury. A bill of exceptions disclosed,

At March term following entry of judgment upon, the by the ther pl

for trial, the defendant of following entry of judgment upon, the by the ther pl
 The defendant below prosecuted his writ of error to this court, and assigned for error, that the County court erred—

1. In rendering judgment against him, without disposing of his plea in abatement.
2. In not permitting the introduction of the evidence, stated in the bill of exceptions.

Proctor, for plaintiff in error.

GOLDTHWAITE, J.—The judgment entry, unexplained, would induce the belief, that the defendant in the court below withdrew his plea, and assented to the rendition of a judgment for the amount of the note; but the bill of exceptions satisfactorily shows, that the plea in abatement was not withdrawn, or the defence abandoned. The defendant might have insisted on his right to a judgment of *non pros*, for want of a replication to his plea. The omission so to do, did not place him in a defenceless condition, or authorise the court to render any judgment against him; and the County court erred in so doing.

If we were even to presume that the usual replication to a plea of this description was filed, and that an issue of *nul tiel record* had been presented to the court for its

determination, it would not better the condition of the defendant in error. The writ offered in evidence showed the commencement of a suit, apparently for the same cause of action, on the eighth day of May, eighteen hundred and thirty-seven. This was returnable to the Circuit court, to be held on the seventh Monday after the fourth Monday of March, eighteen hundred and thirty-seven; and the presumption is strong, if not conclusive, that the Circuit court was in session when the second writ was issued, on the nineteenth of May, eighteen hundred and thirty-seven, returnable to the County court, and the foundation of this suit. The first writ was not executed on the defendant, and the return is 'not found;' but this will not authorise us to infer an abandonment of the suit on the part of the plaintiff, even if that could avail him on the issue we have named.

The evidence offered was proper and pertinent to support the plea on an issue of *nul tiel record*, and ought not to have been rejected, if such was, in point of fact, the state of the record in the court below.

In either aspect of the case, there was error in the action of the County court; and its judgment is reversed, and the cause is remanded.

that when the cause came on for trial, the defendant offered in evidence, a writ issued from the Circuit court, apparently for the same cause of action, and offered to prove that it had never been dismissed or discontinued; but the court would not permit this evidence to be introduced, and gave judgment in favor of the plaintiff.

The defendant below prosecuted his writ of error to this court, and assigned for error, that the County court erred—

1. In rendering judgment against him, without disposing of his plea in abatement.
2. In not permitting the introduction of the evidence, stated in the bill of exceptions.

Proctor, for plaintiff in error.

GOLDTHWAITE, J.—The judgment entry, unexplained, would induce the belief, that the defendant in the court below withdrew his plea, and assented to the rendition of a judgment for the amount of the note; but the bill of exceptions satisfactorily shows, that the plea in abatement was not withdrawn, or the defence abandoned. The defendant might have insisted on his right to a judgment of *non pros*, for want of a replication to his plea. The omission so to do, did not place him in a defenceless condition; or authorise the court to render any judgment against him; and the County court erred in so doing.

If we were even to presume that the usual replication to a plea of this description was filed, and that an issue of *nul tiel record* had been presented to the court for its

determination, it would not better the condition of the defendant in error. The writ offered in evidence showed the commencement of a suit, apparently for the same cause of action, on the eighth day of May, eighteen hundred and thirty-seven. This was returnable to the Circuit court, to be held on the seventh Monday after the fourth Monday of March, eighteen hundred and thirty-seven; and the presumption is strong, if not conclusive, that the Circuit court was in session when the second writ was issued, on the nineteenth of May, eighteen hundred and thirty-seven, returnable to the County court, and the foundation of this suit. The first writ was not executed on the defendant, and the return is 'not found;' but this will not authorise us to infer an abandonment of the suit on the part of the plaintiff, even if that could avail him on the issue we have named.

The evidence offered was proper and pertinent to support the plea on an issue of *nul tiel record*, and ought not to have been rejected, if such was, in point of fact, the state of the record in the court below.

In either aspect of the case, there was error in the action of the County court; and its judgment is reversed, and the cause is remanded.

THE STATE VS. BRILEY.

1. Where the act of eighteen hundred and seven (Aik. Dig. 102,) speaks of disabling a limb or member, a permanent injury is contemplated, such as at common law would constitute *mayhem*: a temporary disabling of a finger, an arm, or an eye, is not sufficient to constitute the statutory offence.
2. Precision of description is unnecessary in an indictment: all that the law requires, is a description of the offence in the words of the statute creating it,—except where technical language is used.
3. Where an indictment charges an offender against a statute, with doing the unlawful act, with malice aforethought, and contains proper allegations of time and place, with a formal commencement and conclusion—it is sufficient.
4. After a conviction on one count of an indictment, a motion in arrest of judgment, cannot prevail.

Error to the Circuit court of Covington.

Indictment for *mayhem*, tried before *Crenshaw, J.*

The indictment contained three counts—the first of which charged as follows: that defendant, “with force and arms, in and upon one P J, did make an assault, and upon the left arm of him the said P J, with a certain stick, which he the said defendant then and there had and held in both his hands, did strike and break, and did on purpose and of malice aforethought, unlawfully disable the said left arm of him said P J, with intent him the said P J, then and there to maim, contrary to the form of the statute,” &c. A demurrer was filed to the indictment, which was overruled, and upon a plea of “not guilty,” the defendant was convicted, and the

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sufficiency of the indictment was reserved by the court below for review.

It was assigned for error, that the indictment was insufficient to sustain the conviction, and that the demurrer thereto should have been sustained.

Cook, for the plaintiff in error.

Attorney General, contra.

The *Attorney General* contended that the declaration was sufficient. As to sufficiency of first count—(See *State vs. Absence*, 4 Porter.)

Joinder of distinct offences no ground of demurrer or arrest of judgment—(1 Chitty's C. L. 175; Arch. 612; Hale, 173.) Court may, in such case, however, quash, or compel prosecutor to elect—(Arch. 61; 2 Camp. 132.)

Good and bad counts and general verdict—one good count sufficient—(*State vs. Coleman*, 5 Porter; 3 Murphy's N. C. Rep. 12.)

The jury, in this case, expressly found on the first count, which brings the sufficiency of that count only under review.

GOLDTHWAITE, J.—The only point reserved for the determination of this court, is, whether the indictment is sufficient to warrant the conviction; the jury having, by their verdict, found the defendant guilty of *mayhem*.

The second and third counts of the indictment, may be entirely discarded from consideration, as it is certain, neither charge that offence—the former being for an as-

sault, and disabling the arm of the individual injured, and the latter for an assault only.

To ascertain if the first count is sufficient, it is proper to notice the terms of the statute under which it seems to have been framed. The act of eighteen hundred and seven (Alk. Dig. 102) enacts, "if any person or persons, on purpose and of malice aforethought, shall unlawfully cut or bite off the ear or ears: or cut out or disable the tongue: put out an eye, while fighting or otherwise: slit the nose or lip: cut or bite off the nose or lip: or cut off or disable any limb or member of any person whatsoever; such person shall be deemed guilty of mayhem."

It is evident, that wherever the statute speaks of disabling a limb or member, a permanent injury is contemplated, as such was the common law notion of the extent of the injury necessary to constitute a mayhem. A temporary disabling of a finger, an arm, or an eye, would not be sufficient to constitute the statutory offence. But it would at all times be exceedingly difficult to frame an indictment, with a view to a specific description of the exact injury sustained. This precision of description is as unnecessary, as it is dangerous, in indictments on statutes, and all that the law requires, is a description of the offence, in the words of the statute creating it—(Arch. Crim. Law, 52.) The only exception that is known to exist to this general rule, is where a statute makes use of a technical term known to the law; as burglary, robbery, &c.—(State *vs.* Absence, 4 Porter, 397.)

Having regard to this general rule, it would seem only to be necessary, that the indictment should charge an

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offender against this statute, with doing on purpose and of malice aforethought, unlawfully, the act complained of. This, with the proper allegations of time and place, with a formal commencement and conclusion, would constitute a sufficient indictment. If we examine the first count, we ascertain that all these allegations are found there, connected with other matters, which, if superfluous, are neither repugnant nor inconsistent with the charge. The statement of the assault and battery with the stick, and breaking the arm, are, indeed, but a history of the violence, which could have been omitted. The superadding the intention to maim, is, when examined, nothing more than a reiteration of the idea previously conveyed to the mind, by the words 'on purpose, and of malice aforethought:' the indictment is, therefore, sufficient to warrant the conviction.

If we were permitted to examine the point, as to misjoinder of the counts, it would avail the defendant nothing, as it is clear, that after conviction on one count alone of the indictment, a motion in arrest of judgment could not prevail.

Let it be certified, that there is no error in the judgment rendered.

JAMES vs. TAIT et al.

1. A promise, under seal, to make a title in fee simple at some future time, to land, provided, the passage of an act of Congress can be obtained to authorise such a conveyance; is properly rejected when offered as evidence, to establish title in a defendant in trespass.
2. Trespass *quare clausum fregit*, will lie to recover possession of lands; and a writ of possession is properly awarded to the successful plaintiff.
3. The conduct of a cause in court, is entrusted to the discretion of the presiding judge, and he may, when necessary, permit a party to introduce evidence, after the testimony is closed.
4. When a *feme sole* plaintiff marries pending a suit—the husband may make himself a party by motion; and where a suggestion is made that such a plaintiff has married, and a *scire facias* issues, calling upon the husband to shew cause why he shall not be made a party—it is equivalent to a motion.
5. After judgment, advantage cannot be taken of an entry on the record, that proceedings were stayed by injunction; and where the parties go to trial afterwards without objection—it will be presumed that the injunction was dissolved.
6. Objections to a declaration cannot be received after a plea of not guilty.
7. Nor can an objection to the endorsement on the writ, be entertained, after the plea of not guilty.
8. In trespass to try title, the plaintiff need only endorse on his writ, "that the action is brought as well to try titles, as to recover damages"—any unnecessary description of the premises, or of the injury committed, is regarded as surplusage.
9. Where the verdict responds to the issue, and judgment is rendered for the land described in the declaration—it is sufficient; and the use of the word "*tenement*," in addition to the description of the lands, does not vitiate the judgment.

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● Error to Clarke Circuit court.

Trespass *quare clausum*, tried by *Pickens, J.*

This was an action of trespass, to try title to a tract of land, brought by the defendant, against the plaintiffs in error.

The writ was in trespass, and the cause of action was thus endorsed: "This action is brought to recover damages of the defendant, for unlawfully, and with force and arms, breaking and entering a certain close of the plaintiffs, to wit, the west fraction of section thirty-six, of township five, range three, east, in the district of St. Stephens, lying in the county of Clarke, aforesaid, and cutting down the timber, &c.; and is brought to try titles, as well as to recover damages."

The declaration contained three counts. In the first count, the *locus in quo* was described as "four closes of the plaintiffs, lying and being in the county of Clarke."

In the second count, it is described as "the close of the said plaintiffs, to wit, the east and west fractions of section thirty-six, of township five, range three, east, in the district of lands offered for sale at St. Stephens, and situate in the county of Clarke." The trespass is alleged to have been committed on the first of March, one thousand eight hundred, and on divers other days and times between that day, and before the commencement of this suit.

The third count described the premises as the "fraction of section thirty, township five, range three, east."

To this declaration, the defendant below pleaded not guilty. The cause was continued until the Spring term, eighteen hundred and thirty-seven, when this entry ap-

peared: "enjoined and continued;" and at the succeeding term, "continued, and the intermarriage of Martha Weatherford with Peyton Downey suggested, a *scieri facias* to issue." A *scieri facias* accordingly issued to said Downey, to appear and show cause why he should not be made a party plaintiff to the suit, which was returned, executed.

A trial was afterwards had, when the jury rendered a verdict for the plaintiffs, by which they found the defendant guilty of the trespasses in the declaration mentioned, and assessed their damage to nine hundred and five dollars—upon which the court rendered judgment in favor of the plaintiffs for the damages, and also for the "tenements in the declaration mentioned, to wit, the east and west fractions of section thirty-six, township five, range three, with the appurtenances."

During the trial, a bill of exceptions was taken, from which it appeared that the defendant below proved and offered in evidence, an instrument in writing or bond for title of the lands in controversy, executed by one Alger Nuoman, and proved that the plaintiffs knew of the execution of said bond, and of the possession taken under it, before the execution of the deed of the plaintiffs below from said Alger and wife. The plaintiffs below claimed as heirs of Mary Dyer, and from said Newman and wife; and said Newman claimed through his wife, as another heir of Mary Dyer. The court refused to permit the bond to go to the jury as *evidence of title*, but permitted it to be read, to ascertain the damages.

The court also permitted the plaintiffs below, after the defendant had closed, to re-examine a witness as to new

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matter, which had not arisen in the examination of either party, and not appertaining to any point which had arisen on the examination in chief; the plaintiffs' attorney stating, that he had inadvertently omitted to prove the facts, on the examination in chief. The court permitted the proof to be made, reserving to the defendants the right to reply to the examination. These matters were all excepted to by the defendant below.

The instrument or bond, relied on by the defendant below, was in these words:

"Know all men, by these presents, that I, Alier Newman, of the county of Monroe, and State of Alabama, am held and firmly bound, unto Robert D. James, of the county of Clarke, and State aforesaid, in the just and full sum of sixteen hundred dollars, for the faithful payment of which, well and truly to be made, I hereby bind myself, my heirs and assigns, executors and administrators, firmly, by these presents, signed with my hand, and sealed, this 18th July, 1832.

"The condition of the above obligation is such, that whereas the said Robert D. James, has advanced to and paid for, and on account of said Alger Newman, the sum of four hundred dollars, at and before the sealing and delivery of these presents, the receipt and payment of which, as aforesaid, is hereby acknowledged; and whereas the said Alger Newman, in right of his wife, Elizabeth, and under and by virtue of the treaty with the Creek tribe of Indians, and designated as the treaty of Fort Jackson, his said wife being one of the heirs of Mary Dyer, has become possessed of the legal claim to the undivided third part of a certain tract or parcel of

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land, situate, lying and being in the counties of Clarke and Monroe, and State of Alabama, and being the fractional section number thirty-six, in township five, range three, east, containing three hundred and twenty-four 95-000 acres, on the west side of the Alabama river; and one hundred and twenty-four 66-100 acres, on the east side of the said river; and whereas the said Alger Newman, for and in consideration of the payment aforesaid, and a further payment to be made, as hereinafter mentioned, is desirous to transfer in fee simple, his said claim to the said lands above described, but is now debarred from conveying the same, by the treaty aforesaid;—he therefore hereby agrees, that he will use his best exertions to obtain, under a law of Congress, as soon as possible, the right to dispose of and sell the said tract of land; and should he obtain said right, he will forthwith convey the same in fee simple, to the said Robert D. James, his heirs or assigns. And the said Alger Newman further agrees, that in the event he shall not be able to obtain said right to dispose of the same, then he will, on the first day of March, eighteen hundred and thirty-three, or previously thereto, secure by mortgage, one good, sound and healthy negro woman and child, of value equal to the penalty of this bond, to the said Robert D. James, for the sum of money which he shall have already advanced to and on account of the said Alger Newman, and also for the further sum of four hundred dollars, which the said Robert D. James agrees to pay to the said Alger Newman; on the completion of the said mortgage; and the said Robert D. James agrees for himself, his heirs, &c. that in the event the said title shall not be comple-

ted, in manner and form aforesaid to him, by the said Alger Newman, then, if the heirs and descendants of the said Newman, or his or their assigns, shall well and truly convey to him their representative shares, titles and claims to said land, on arriving at the age required by said treaty, to entitle them to convey the same, he, his heirs, &c., will relinquish to each of them, respectively, a corresponding proportional share or claim, of and to said mortgaged property. Now, therefore, if the said Alger Newman shall well and truly observe, keep and perform the conditions and obligations, herein agreed to be by him kept and observed, then this obligation to be void; otherwise, to be and remain in full force and virtue."

From the judgment of the court below, the defendant below prosecuted a writ of error to this court; and now assigned for error—

1. The court below erred in allowing new evidence to be introduced by the plaintiff, after his evidence had closed;

2. In rejecting the deed set forth in the bill of exceptions;

3. In rendering judgment for tenements not sued for, as shewn by the endorsement on the writ;

4. In awarding a writ of possession, in an action of trespass merely;

5. The writ, endorsement, declaration and verdict, are variant, inconsistent and insufficient;

6. The judgment is uncertain, and does not sufficiently describe the property recovered, and is for *tenements*, and therefore not authorised by the statute, which allows a writ of possession for lands only;

7. In proceeding before the injunction was dissolved;

8. In rendering judgment in favor of Peyton Downey, when he was not made a party;

9. The verdict is erroneous, because, for all the lands in the declaration—part not being described, part not sued for—and not specifying to be for the lands which are described, and because the lands are not sufficiently described or identified, which are recovered by the verdict;

10. The judgment being for premises described in the third count only, and the entry being therein laid more than twenty years ago, the right of entry of plaintiffs was tolled, and judgment could not be thereon given.

Stewart, for plaintiff in error.

Porter, contra.

ORMOND, J.—It appears from the bill of exceptions, that the bond from Newman to the plaintiff in error, was offered in evidence, as establishing a title to the land in controversy, in the plaintiff in error. It appears to be a promise on the part of Newman, to make a title in fee simple to the land, or some portion of it, to the plaintiff in error, at some future time, provided he could obtain the passage of an act of Congress, authorising him so to do; and that failing to obtain such act, he would indemnify him for his advance of money, by a mortgage on a negro woman.

It is not necessary to enquire, whether a Court of Chancery could have, under any circumstances, enforced

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a specific performance of this agreement; it was clearly unavailing, for the purpose for which it was offered in evidence, and was, therefore, properly rejected.— Whether it could have had the effect to show that the possession of the plaintiff in error was adverse to the defendants, it is not necessary now to discuss, as it does not appear to have been offered for that purpose in the court below.

The objection to the form of the action cannot prevail. In the case of Thrash vs. Johnson, (6 Porter's Rep. 458,) the same objection was made as in this case, and overruled by the court. In that case, as in this, the action was trespass *quare clausum fregit*.

It cannot be assigned as error, that the court permitted evidence to be introduced by the defendant in error, after the close of the plaintiffs' testimony. The conduct of the cause, in the court below, is entrusted to the discretion of the presiding judge. We cannot presume that he has exercised that discretion improperly; nor is it a matter that we can revise; but so far as we can judge of the decision, from the account in the bill of exceptions, it appears to have been entirely correct.

The assignment, that Peyton Downey was not made a party, is not sustained by the record. The statute provides, that when a *feme sole* plaintiff marries pending the suit, the husband may make himself a party to the suit, by motion. It appears from the record, that a suggestion was made, that said Downey had intermarried with Martha Weatherford, one of the plaintiffs, whereupon a *scire facias* issued to him, to show cause why he should not be made a party to the suit. This was an

unnecessary proceeding, but must be considered as equivalent to a motion, especially as he is named as one of the plaintiffs, in all the subsequent proceedings of the cause.

No advantage can now be taken of the entry on the record, that the proceedings were at one time stayed by injunction; as the parties went to trial afterwards, without objection, we must presume that the injunction was dissolved.

All the remaining objections, except those relating to the verdict and judgment, are answered by the decision of this court, in the case of Sturdevant vs. Murrell's heirs, in which this court, under the influence of a statute of this State, held, that no objection can be taken to the declaration, after the plea of not guilty filed.

The court say, "our conclusion is, that, in the action of trespass to try title, the declaration should describe the land in controversy, with so much particularity and precision, as will inform the defendant what he is to defend against, and the court, for what it is called on to render judgment. But, in the present case, the plaintiff in error cannot avail himself of an objection to the declaration; he is foreclosed, by having pleaded *not guilty* in the Circuit court. The statute is express to the point"—(Aik. Dig. sec. 46, p. 266.)

If no objection can be taken, after the plea of not guilty to the declaration, it necessarily follows, that none can be made to the endorsement on the writ. The statute does not require the plaintiff to do more than to endorse on the writ, "that the action is brought as well to try titles, as to recover damages;" the rest may, therefore, be

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rejected as surplusage, especially after the plea of not guilty, to the declaration, is filed.

The objection to the verdict and judgment cannot be sustained. The verdict of the jury, is responsive to the issue, and the judgment of the court is for the land described in the third count of the declaration. It is insisted, also, that the word "*tenement*," employed by the court in rendering judgment, is not sufficient to entitle the defendants in error to recover *lands*. Without conceding that the objection is good, it is sufficient, that, in this case, a judgment is rendered for the lands claimed in the declaration, by the appropriate description, according to the United States' survey; and this certain and accurate description cannot be vitiated by the use of the word *tenement*, in addition, even if it were of doubtful import, standing alone.

There is no error in the judgment of the court below, and it is hereby affirmed.

Johnson vs. Robertson and wife.

JOHNSON vs. ROBERTSON & WIFE.

1. Where a scandalous imputation affects the accused, in his office, profession or business, an action of slander will lie without averring special damage.
2. Saying of a physician, "he has killed the child by giving it too much calomel," is actionable.
3. To charge a person with having killed another, without explaining or limiting the words, imports an accusation of murder, and is actionable.
4. Where words are actionable, in themselves, the law implies damage, and the action is allowed not only to compensate for pecuniary loss, but to afford redress for wounded feelings and prostrate reputation.
5. Where words are actionable, in themselves, it is not necessary to lay special damages, and no evidence of special damage can be received, unless specially averred.
6. An averment, that certain persons who are named, "*and divers other persons*," would otherwise have employed the plaintiff,—is not sufficient to authorise proof of special damages, by others than those specially named.
7. Though a plaintiff may enhance damages by proof of special damages, it does not follow, that the jury are confined, in estimating the damages, to the pecuniary loss proved;—they may compensate the injured party, taking into consideration, not only his pecuniary loss, but all the circumstances of the case.
8. A witness cannot be asked, in slander, if he knows of other persons refusing to employ plaintiff, by reason of the slanderous words spoken,—than those mentioned in the declaration.

Error to the Circuit court of Lowndes.

Slander, tried by *Harris*, J.

This was an action of slander, brought by the plaintiff in this court, against the defendants, for slanderous words spoken by the wife.

The declaration contained eight counts. To all the counts, except the second, a general demurrer was filed, which were sustained by the court.

The second count differed from the other counts contained in the declaration, in this ;—that it contained an averment, that in consequence of the speaking and publishing of the words alleged to be slanderous, certain persons, mentioning their names, who otherwise would have employed plaintiff as a physician, had refused to employ plaintiff.

Issue, on the plea of not guilty, being taken on the second count, the jury found a verdict for the defendants.

On the trial of the cause, a bill of exceptions was taken, from which it appeared, that the plaintiff offered to prove by a witness, that other persons than those named in the declaration, had refused to employ the plaintiff as a physician, by reason of the words spoken ; which was refused by the court.

The plaintiff also asked a witness, if he knew of any person refusing to employ the plaintiff, by reason of the words spoken ; which question was objected to, and the objection sustained by the court.

The plaintiff moved the court to instruct the jury, that if he had proved any damages, the jury might give vindictive damages ; which the court refused, and instructed the jury, that the measure of damages was limited to the extent of the injury proved to have been received : to which, exceptions were taken. These matters were assigned for error.

Phillips, for plaintiff in error.

James B. Clarke, contra.

ORMOND, J.—The judgment of the court below, sustaining the demurrers to the first, third, fourth, fifth, sixth, seventh and eighth counts of the declaration, cannot be sustained. The slanderous words charged in the four first counts of the declaration, are, in substance, “he (meaning the plaintiff,) has killed the child by giving it too much calomel;” which words, it is alleged, were falsely and maliciously spoken of the plaintiff as a physician, and in the way of his profession and business, in his attendance upon the infant child of the defendant.

The only objection now made by counsel, to the counts which were demurred to, is, that the words are not slanderous. This is certainly incorrect, when the scandalous imputation affects the person accused, in his office, profession or business. An action of slander will lie, without averring any special damage; which is the form of the counts we are now considering. Scarcely any thing can be conceived, better calculated to injure a physician in his practice, than to accuse him of killing his patients. The inevitable inference is, that he is grossly ignorant of his profession, or neglectful of his patients. If these words do not include a slanderous imputation, when spoken of a physician, it is difficult to imagine what words would be sufficient.

The remaining counts of the declaration, charged the defendant with having “kil'ed the child;” meaning, that the child, who was then dead, had been killed and murdered by the plaintiff. The words are slightly varied

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in some of the counts, but, in substance, they are the same. It is not alleged, that they were spoken of the plaintiff as a physician.

To charge a person with having killed another, without any accompanying words, explaining or limiting the meaning of the words, imports an accusation of murder—(See 6 Bacon, 207, and Chandler vs. Holloway, 4 Porter's Rep. 17)—and are, of course, actionable.

The judgment of the court, therefore, sustaining the demurrers to each of the counts of the declaration, except the second, was erroneous.

The court also erred, in charging that the plaintiff could not recover damages, beyond the extent of the injury he had proven he had received by the slanderous charge.

It is true, as urged by the counsel for the defendant in error, that, in this action, the measure of damages is the extent of the injury received by the person slandered: but this he is not required to prove. When words are slanderous in themselves, the right to damages follows, as a consequence, from the speaking of the slanderous words; because, it is the inevitable tendency of slander, to injure the person slandered, in his reputation, profession, trade or business. It would frequently be difficult to prove any pecuniary injury from the slander, and always impossible to establish its full extent. Besides, the action is allowed not only to compensate for pecuniary loss, but to afford some redress for wounded feelings and prostrate reputation. Therefore, when words are actionable in themselves, the law implies damage.

The words being actionable in themselves, it was not

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necessary to lay special damage; but no evidence of special damage can be received, unless specially averred in the declaration. The averment, in the second count, that certain persons who are named, "and *divers other persons*, who would otherwise have employed the plaintiff in the way of his said profession and business," is not sufficient to authorise proof of special damage, by others than those specially named. But though the plaintiff may enhance the damages, by proof of special damage, it does not thence follow, that the jury are confined in estimating the damage, to the pecuniary loss proved to have been sustained. The jury may give such damages as will compensate the injured party, taking into consideration not only his pecuniary loss, but all the circumstances of the case.

There was no error in the court's refusing to permit a witness to be asked, whether he knew of any person refusing to employ the plaintiff, by reason of the words spoken. If the knowledge of the witness was derived from hearing such persons assign their reasons for not employing the plaintiff, it is open to the objection, of being hear-say testimony. If he inferred it from their conduct, they alone could explain the motives which influenced them. It is also obnoxious to the further objection, that it does not appear that the persons referred to, were those named in the declaration; and, if not, they could not themselves have testified.

The judgment must be reversed, and the cause remanded for further proceedings, in conformity with this opinion.

GOLDTHWAITE, J., not sitting in this case.

Dean vs. Fail.

DEAN vs. FAIL.

1. Matter admissible under a plea of *liberum tenementum*, may be given in evidence under the general issue.
 2. The object of a plea of *liberum tenementum*, is usually to compel plaintiff to assign the place in which he alleges the trespass to have been committed, with greater precision.
 3. Where one rents land, for the purpose of making a crop, upon the condition that he is to give up possession in case the owner sells to a third person, before the crop is made;—it is not competent for the tenant, in case a sale is made, to object, that the contract of sale is not evidenced by a deed conveying a perfect title.
- [1. The lessee of one who has neither possession nor legal title, cannot justify a trespass committed upon a party, in possession of the premises.
2. To justify an entry on the possession of another, he who enters must have a *legal right of entry*; or should enter under the license or command of one having such *legal right*.
 3. In trespass *quare clausum fregit*, evidence which makes out a case of justification, is only admissible under the general issue. GOLDTHWAITE, J., *in dissenting*.]

Error to the Circuit court of Wilcox.

Trespass *quare clausum fregit*, tried by *Pickens, J.*

Plea, not guilty. Verdict and judgment for defendant.

The plaintiff in error declared against the defendant, in the Circuit court of Wilcox, in trespass *quare clausum fregit*, and went to trial on an issue taken on the plea of "*not guilty*."

On the trial, the presiding judge, at the request of the plaintiff, sealed a bill of exceptions; from which it ap-

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peared to have been proved, that "Jonathan Kennedy owned the tract of land on which the trespasses mentioned in the declaration in said cause were committed; and that said Kennedy had rented said land in the spring, A. D. eighteen hundred and thirty-five, to said Dean, to make a crop, on condition, that if said Kennedy sold said land, said Dean should quit it; and that by virtue of said renting, said Dean had taken possession of said land, and worked there about five days, when he was dispossessed by said Fail. It was further proved, that said Kennedy had made a contract for the sale of said land, and had received a large portion of the consideration, some time in the spring of said year eighteen hundred and thirty-five, with one Rives, and had told said Rives to go and take possession of said land. But it was not proved that said Kennedy had ever demanded possession of said land from said Dean; and it was further proved, that before any deed of conveyance of said land had been signed between said Rives and said Kennedy, the said contract was rescinded, but that said Rives had rented said land to said Jeremiah Fail, before the rescission of said contract of sale, and by virtue of said renting, said Fail had dispossessed said Dean of said land, and kept possession of it for the remainder of said year. In said cause, the judge that presided, instructed the jury, that if they believed said Fail had committed the supposed trespass in the declaration in said cause mentioned, and dispossessed said Dean of said tract of land, prior to the rescission of said contract of sale, between said Rives and said Kennedy, they ought to find a verdict for said Fail." To all which, the plaintiff excepted, &c. and now

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presented to this court, the questions of law arising upon the bill of exceptions for revision.

COLLIER, C. J.—It was not competent for the plaintiff to object, that the contract of sale by Kennedy to Rives, was not evidenced by deed, conveying a perfect title. The agreement between Kennedy and the plaintiff, was, that the latter should occupy the land, (on which the trespass is alleged to have been committed,) for the purpose of raising a crop thereon, with this condition, that if the former should sell, the plaintiff would relinquish the possession. The bill of exceptions does not inform us how far Kennedy and Rives had advanced towards a consummation of title under their contract, so that there may (for any thing appearing to the contrary) have been such written evidence of their contract, as would have authorised equity to enforce its completion, had either party objected.

But it is quite immaterial to the present inquiry, whether the agreement for a sale was such as could have been coerced. Objections to its validity concerned the parties themselves, and it was not for a stranger to supervise their contract, and shape his course according as he might adjudge it to be obligatory or not. The contracting parties might execute it, under a sense of honor, moral duty to each other, or mutual interest, and it would be as valid from that period, as if it had been perfect in its inception. So far, then, as we are able to form an opinion from the proof in the record, the event on which the right of the plaintiff to occupy the land under his agreement with Kennedy was to cease, did actually

happen, as soon as Kennedy sold to Rives, with a right to the immediate possession. Kennedy might have brought his action against the plaintiff, had he refused to quit, and, as a necessary consequence, may have authorised Rives to enter; and this right, thus acquired by Rives, would extend to legalise an entry by his agents and servants, in obedience to his directions. It will, therefore, follow, that if the defendant entered under the authority of Rives, upon the possession of the plaintiff, he committed no trespass: unless, the manner of his taking possession, or subsequent acts, make him a trespasser.

No objection seems to have been raised in the Circuit court, to the admission of the evidence, yet, as the question comes up on the instructions to the jury, it may, under the state of the pleadings, be well to consider it. The facts, when simplified, amount to proof of title in a third person, and the right to possession in the defendant himself.

There is no necessity for pleading *liberum tenementum* specially. The object of such a plea, usually, it is said, is to compel the plaintiff to assign the place in which he alleges the trespass to have been committed with greater precision—(Stevens *vs.* Whistler, 11 East, 51); and the defendant may give the matter admissible under such a plea, in evidence under the general issue—(Péake's N. P. 67; Willes' R. 222; Derisley *vs.* Neville, 1 Leon's R. 301; Garr *vs.* Fletcher, 2 Starkie's Cases, 71; Gilb. Ev. 258; Chambers *vs.* Donaldson, 11 East's R. 72.).

In *Argent vs. Durrant*, (8 T. R. 403,) the point came directly before the court, when Lord Kenyon, in pro-

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nouncing his opinion, observed, "It is now too late to discuss this question, which appears to have been settled in Lord Coke's time, in a case in 1 Leon, 301. In trespass, 'the defendant pleaded not guilty; and if he might give in evidence, that at the time of the trespass, the freehold was in such an one, and he, as his servant, and by his command, entered, was the question; and it was said by Coke, that the same might so be well enough; and so it was adjudged in Trevilian's case; for, if he by whose command he entereth, hath right at the same instant that the defendant entered, the right is in the other, by reason whereof, he is not guilty as to the plaintiff; and judgment was given accordingly.' Conformably to this doctrine, I have always understood that it has been the practice, to permit the defendant to give *liberum tenementum*, in evidence under the general issue." (To the same effect, is *Dodd vs. Kyffin*, 7 T. R. 354; *Van Buskirk vs. Irving*, 7 Cowen's R. 35; and *Tuthill vs. Clark*, 11 Wend. R. 642.)

There seems to have been no controversy in the Circuit court in regard to the evidence: the facts disclosed in the bill of exceptions are said to have been *proved*. We understand, then, that the verdict of the jury was influenced by the instructions of the court, on the solitary legal question, whether Kennedy's sale gave a right of entry and possession, as against the plaintiff. On this point, our opinion is expressed already; and if Kennedy was entitled to enter, as against the plaintiff, either Rives or Fail might successfully defend themselves under his authority; from which, it follows, that the judgment must be affirmed.

GOLDTHWAITE, J.—I am unable to concur in the judgment of the court now pronounced.

If the defence attempted, can be permitted under the plea of the general issue, it is material to enquire, whether the evidence made out a case of justification. To justify an entry on the possession of another, one of two things must exist; he who enters, must have a *legal right of entry*, or should enter under the license or command of some one having such *legal right*. In the present case, it seems to me, that Fail, the defendant, had no *legal right*, nor did he enter by the command or license of Kennedy, who had. If we test the evidence by a special plea, it would be stated, that the defendant entered the close in question, having *legal title* to the same, or that Kennedy had such legal title, and the entry was made by his *license or command*.

The evidence certainly would not support a plea, framed under the supposition that a legal title was in him, for his lessor neither had the possession, nor the title to the land. If the plea contained the averment of a license or command from Kennedy to enter, the party would fail in his defence, because no such command or license is shewn from the evidence. The permission of Kennedy to Rives, was neither a command or license to Fail to take the possession. This will be evident, if we suppose some act done by Fail in taking possession, which, independent of the trespass on the land, would have constituted him a *tort feasor*. Would Kennedy have become liable to Dean, in consequence of the authority given to Fail? I think he could not be made liable under the evidence, as no authority can be implied from the circumstances of this case.

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The Circuit court seems to have considered, (at least such is the inference I draw from its charge,) that a right of entry was conveyed to Rives, by the contract of sale, independent of any conveyance by which the title passed, and that this, was conveyed to Fall by the case to him. Whether it is considered in this, or the other view which I have taken, there was, in my judgment, an error committed, as in neither event could Fall be justified under the circumstances disclosed.

EVANS vs. SANDERS.

1. In the construction of written contracts, the intention of the parties, as ascertained from the terms and the subject matter, determines the meaning.
2. And, in questions of doubt, the contract is to be construed most strongly against the party who stipulates the payment of a debt, or the performance of a duty.
3. Where the terms of a contract are susceptible of two significations, they must be understood in the sense most agreeable to the nature of the contract:—and where a clause is susceptible of different constructions, it must be taken in the sense that will give to it some operation, rather than that which will have none.
4. Where one promised by a written contract, to pay money on the first day of January, eighteen hundred and thirty-six, with interest from eighteen hundred and thirty-five; it was held, that the intention of the contracting parties, was, that interest was to be paid from the first day of January, eighteen hundred and thirty-five.

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Error to Wilcox Circuit court.

Assumpsit on note, tried by Judge *Pickens*.

The defendant in error, brought an action of *assumpsit* against the plaintiff, in the Circuit court of Wilcox, on a promissory note of the following tenor :

"\$1243 83.

"Wilcox county, So. Alabama, 20th December, 1834.

On first January, eighteen hundred and thirty-six, (with interest from 1835,) I promise to pay Moses Sanders, or bearer, twelve hundred and forty-three dollars, and eighty-three cents, for value received.

(Signed,)

HARRIS SMITH EVANS."

The only point made by the assignment of errors, arose out of a bill of exceptions, which was taken at the trial, to the charge of the presiding judge, in instructing the jury, that interest was recoverable on the note sued on, from the first day of January, eighteen hundred and thirty-five.

Stewart, for plaintiff in error.

COLLIER, C. J.—It is an acknowledged rule, in the construction of written contracts, that the intention of the parties, as ascertained from its terms, and the subject matter, determines its meaning—(See Pothier, part 1, c. 1, s. 1, art. 7; *Davis et al. vs. Barney*, *Harris & Gill*, 382; *Harper vs. Hampton*, 1 *Har. & Johns. R.* 672; *ibid.* 658 and 661; *Fallow vs. Martin*, *Harper's So. Ca. R.* 410.)

So, in questions of doubt, it is equally well settled, that the contract is to be construed most strongly against the party who stipulates the payment of a debt, or the

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performance of a duty—(Pothier, *ut supra*; Judkins et al. vs. Earl et al. 7 Greenl. Rep. 9; Withers vs. Thompson, 4 Monroe's Rep. 329; Kimball vs. Cunningham, 4 Mass. Rep. 502; Conner vs. Henderson, 15 Mass. Rep. 319.)

Again: where the terms of a contract are susceptible of two significations, we ought to understand them in a sense, which is most agreeable to the nature of the contract; and where a clause is susceptible of different constructions, it should be taken in that sense which will give to it some operation, rather than that which will have none—(Pothier, *ut supra*; Falcon, adm'r, vs. Harris, 2 Hen. & Munf. R. 550.)

The contract, in the case at bar, it is admitted, is in an unusual form, and so expressed, as to require an application of the rules of construction. Without attempting any thing like an abstract critical examination of the word "from," which we are not quite sure would lead to the conclusion, that, when used in connection with time, always means *after* the period has transpired, we are satisfied, that it cannot be thus interpreted, in the present case. What effect would the terms, "from 1835," have, were we to take them as expressing after the determination of that year? The legal effect of the plaintiff's undertaking, independent of such a clause, would have subjected him to the payment of interest. The parties cannot be supposed to have used words, without any definite meaning in view; and there is no pretence for saying that they contemplated an intermediate period, between the first of January, eighteen hundred and thirty-five, and of January, eighteen hundred and thirty-six. So, that the only interpretation which, in

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our judgment, is authorised by the rules we have laid down, and will effectuate the intention of the parties, is, to give interest from the first of January, eighteen hundred and thirty-five. There is, then, no error in the judgment of the Circuit court, and the same is affirmed.

TERRY *vs.* FERGUSON, adm'r.

1. A tenant, who has enjoyed the possession of land, without interruption, for the entire period of his lease, cannot be allowed to avoid the payment of rent, by shewing a defect of title in his landlord.
2. A purchaser cannot resist the payment of the purchase money, for defects in the vender's title, when he has taken possession of, and remains in the quiet enjoyment of the premises.
3. Nor can a tenant, in ejectment, be permitted to shew that his landlord had no title at the time of making the lease—though, perhaps, he may prove that his landlord's title has since that time expired.
4. And the purchaser of a personal chattel has been inhibited, while holding possession, from resisting the payment of the purchase money, by alleging a want of title in his vendor—therefore;
5. Where one accepted a lease from an administrator, and undertook to pay him rent, he was not allowed to object a want of title in the administrator.
6. An administrator is not required to exercise a control over the real estate of his intestate,—yet, if he assume to lease it, he will hold the rent in trust for those legally entitled.

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Error to the Circuit court of Pickens.

Assumpsit for rent of land.

The defendant brought assumpsit against the plaintiff, in the Circuit court of Pickens, for the recovery of rent, which the second count in the declaration alleged that *the plaintiff had assumed and promised to pay to the defendant*, in consideration that he (as administrator of the estate of Bryant Ferguson, deceased,) had allowed him to occupy a parcel of land belonging to the estate of his intestate, situate in the county of Pickens. The case was tried on the plea of *non-assumpsit*, and an issue on the plea of *tender*. In answer to which, the jury returned a verdict for the defendant in error, and judgment was rendered accordingly. To review the proceedings in the Circuit court, the case was brought here by writ of error; and the error assigned was, that an administrator had no right to rent the land of his Intestate's estate.

Porter, for plaintiff in error.

COLLIER, C. J.—It is an old and well settled rule of law, that a tenant who has enjoyed the possession of land, without interruption, for the entire period of his lease, shall not be allowed to avoid the payment of rent, by showing that his landlord's title was defective, or that he had no title—(See Perkins *vs.* the Governor, Minor's Rep. 352.) So strict and unbending is the law in this respect, that it has been often holden, that a purchaser of land cannot resist the payment of the purchase money, for defects in the vendor's title, when he has taken possession, and remains in the quiet enjoyment of the pre-

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mises—(See Christian vs. Scott, 1 Stew. R. 490, and Wade vs. Killough, 3 Stew. & Por. Rep. 431, and cases there cited.) Nor, when sued in ejectment, will the tenant be permitted to show that his landlord had no title *at the time* of making the lease, though perhaps he may prove that his landlord's title has since that time expired—(Heckart vs. McKee, 5 Watts' R. 385; Jackson vs. Rowland, 6 Wend. R. 666; 2 Caine's R. 216; 7 Johns. R. 324; 19 Johns. R. 77.) And the rule has even been carried so far, as to inhibit the purchaser of a personal chattel, while holding possession, from resisting the payment of the purchase money, by alleging a want of title in his vendor—(Ogburn vs. Ogburn, 3 Porter's R. 126.)

The second count of the declaration does not disclose an *implied promise, resulting from a permission to use and occupy*, but the promise is express, and the relationship of landlord and tenant distinctly shown. It is clear, that the duties of an administrator do not require, or even authorise him, in *the ordinary course of administration*, to exercise a control over the real estate of his intestate; yet, if he assumes to lease it, he will hold the rent *in trust* for those legally entitled. We lay no stress upon the fact, that the judgment was rendered on verdict, nor attempt to draw to its aid the doctrine of intendment, which, if necessary, might perhaps be successfully invoked; but the declaration alleging a state of facts which show the plaintiff accepted a lease of the defendant, and undertook to pay him rent,—we think the former cannot object a want of title in the latter. The judgment must be affirmed.

Smith & March vs. Paul.

SMITH & MARCH VS. PAUL.

1. A declaration against defendant, as drawer of a bill, which does not allege presentment for payment, and notice of refusal, is not a defect available in error.
2. Where one draws a bill on himself, and accepts it, and is afterwards sued as drawer, in default of payment—he will be liable, without notice of non-payment, as it was his duty to provide for the payment of the bill,—and he must have had knowledge that it was unpaid.
3. Where a judgment is entered up for more than the amount due, a motion by a defendant for a new trial will be refused, on condition that plaintiff remit the excess.
4. And, in such a case, if the clerk issue execution for more than the amount due on the judgment, the remedy is to supersede the execution.

Error to Tuscaloosa Circuit court.

Assumpsit on bill of exchange, tried by Judge *P. Martin*.

This was an action of assumpsit, brought by the defendant in error, as endorsee of a bill of exchange, against the plaintiffs in error.

The declaration was in the following words:

"State of Alabama:

"In the Circuit court, March term, 1838. Tuscaloosa county; to wit; James Pan^l, plaintiff, by his attorney, complains of Thomas A. Smith and Thomas C. March, partners, under the firm of Smith & March, defendants in custody, &c. of a plea of trespass on the case on promises, &c. For that whereas the said defendants here-

tofore, to wit, on the first day of January, in the year eighteen hundred and thirty-seven, at Tuscaloosa, to wit, in the county aforesaid, made a certain bill of exchange in writing, dated the day and year aforesaid, and directed the same to Smith & March, Tuscaloosa, and thereby requested said Smith & March, twelve months after the date of that first of exchange, (second of the same tenor and date unpaid,) to pay to the order of Willis Banks, the sum of five thousand 68-100 dollars, negotiable and payable at the branch of the Bank of the State of Alabama, at Mobile, for value received; which said bill of exchange was afterwards, to wit, on the day and year aforesaid, presented to the said Smith & March, the said defendants, for acceptance, and by them accepted; and the said Willis Banks, to whom the same was payable, afterwards, to wit, on the day and year aforesaid, endorsed the same to John J. Webster, who then and there endorsed and delivered the same to the plaintiff, and thereby ordered and appointed the contents to be paid to the said plaintiff. Yet, the said defendants, although often requested so to do, have not yet paid the said sum of money to the said plaintiff, but so to do have hitherto wholly neglected and refused, to the plaintiff's damage ten thousand dollars; and therefore, suit, &c.

G. W. CRABB, Att'y for plaintiff."

To which the defendant pleaded *non-assumpsit*. There was a verdict and judgment for plaintiff below.

The defendants below moved for a new trial; which motion was overruled, on the plaintiff's agreeing to enter a *remittiter* for the sum of seven hundred and ninety-two dollars, and fifty cents.

Smith & March vs. Paul.

From this judgment, the defendant below prosecuted a writ of error, and assigned as reasons for reversing the judgment—

1. That the declaration did not state notice to the defendants below, of the refusal of the acceptors to pay, the action being against the drawer of a bill which was accepted ;

2. Because the action being against defendants below, as drawers of an accepted bill, they are not liable to an action, unless in default of the acceptors, which is not shown ;

3. Because the declaration did not state protest of the bill for non-payment ;

4. Because no final judgment could be rendered, and execution awarded ; a new trial having been granted.

Porter, for plaintiff in error.

Stewart, contra.

ORMOND, J.—The argument, in this case, is founded on the supposition, that the declaration is against the plaintiffs in error, as drawers of the bill of exchange on which the action is founded, and that the failure to allege presentment for payment and notice of refusal, is a defect available on error. If the assumption were correct, the defect would be cured, after verdict, by the statute of Jeofails. But, on looking into the declaration, it is quite clear, that the defendants are charged as acceptors. The averment in the declaration is, that the defendants (plaintiffs in error) drew the bill on themselves, and accepted it ; and if it were true, that they were

Smith & March vs. Paul.

charged as drawers of the bill, in default of payment, they would be liable, without notice of non-payment, as it was their duty to provide for the payment of the bill, and they must have had knowledge that it was unpaid. The reason of the law, in requiring notice, fails, in such a case—(See Chitty on Bills, 355, and cases there cited.)

The last assignment of error is not sustained by the record. The motion for a new trial is refused, on condition that the plaintiff below enter a *remittitur*, which, from the record, it appears the plaintiff agreed to.—Should the clerk issue execution for the whole amount of the judgment, the remedy would be, to supersede the execution.

The judgment is affirmed.

Teat vs. Lee, adm'r.

TEAT vs. LEE, adm'r.

1. In distributing an estate, where parties in interest will not, or are incapable of consenting to an adjustment, the administrator should obtain permission to sell so much of the estate, as will enable him to make an equal division.
2. The statute (Aik. Dig. 155,) delegates power to the judge of the County court, where the parties cannot agree, to ascertain, by testimony, the value of property brought into hotchpot, as a judicial officer; or to cause a jury to be impaneled for that purpose. It is error, therefore, for commissioners to make the valuation, or for the court to confer authority to that effect.
3. The law nowhere authorises the rendition of decrees, and the award of execution thereon against distributees, for balances against them on distribution.

Error to the County court of Lowndes:

Decree for equalising distribution.

In this case, the Orphan's court appointed commissioners to divide the personal property—the estate being clear of debt. They were ordered to value advancements under the law of hotchpot. The commissioners divided the estate, and charged the plaintiff with seven hundred and ninety-two dollars, and seventy cents, to be paid to the administrator, for the purpose of making the shares of the other heirs equal to that of plaintiff.

Upon this report, judgment was rendered in favor of the administrator for that amount, and execution ordered. There was no final settlement or division of the estate.

Plaintiff in error assigned—

1. The court had no power to appoint commissioners to divide the estate brought into hotchpot. The commissioners could not value the advancements.

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2. The division of the estate ought not to have been sanctioned by the court, because it did not make an equal distribution of the effects.

3. There was error in charging the plaintiff in error with the sum of money specified, in favor of the other heirs, to make them equal.

4. There was error in rendering judgment and execution for the sum specified, against plaintiff in error, and in favor of defendant; and also for charging plaintiff in error with costs.

Cook, for plaintiff in error.

COLLIER, C. J.—Three points have been made upon the record, in this case.

First—It is insisted that the Orphan's court should not have approved of the division and distribution of the estate of the defendant's intestate, because it is unequal.

Second—That the advancements of the distributees brought into *hotchpot*, have not been valued in the manner the law directs.

Third—There is no law which authorised the rendition of a final decree and award of execution against the plaintiff, as one of the distributees, for an excess of intestate's estate (beyond his share) received on the distribution.

1. We are not aware of any law which would coerce a distributee to receive a larger portion in value of his intestate's estate than his distributive share, and thus become chargeable to the administrator for the excess. In distributing an estate, consisting of slaves and other per-

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sonal property, it is difficult so to equalise a division, that none of the distributees shall be better provided for than the others. To prevent all controversy, in such a case, where the parties in interest either will not, or are incapable of consenting to an adjustment, the only legal course seems to be, for the administrator to obtain permission to sell so much of the estate as will enable him to make an equitable division—(Aik. Dig. s. 12, p. 155.)

2. By the second section of the act of eighteen hundred and twenty-eight, entitled "an act concerning the estates of deceased persons," it is enacted, that "when one or more of the heirs of any deceased intestate, shall have received property of the ancestor in his life time, and shall wish to bring the same into hotchpot, and the parties cannot agree as to the value of such property, the same shall be ascertained by testimony, and affixed by the judge of the County court of the county, where letters testamentary or of administration shall have been granted; and it shall be his duty to do so, on the application of any person concerned in interest, on due notice to the other persons interested; and the said judge may, at his discretion, empanel a jury to assess the value of the property in question; and on the application of either party for a jury, it shall be the duty of the judge to cause the same to be empaneled; and in all cases, the value of the property at the time it was delivered, shall be fixed by said judge or jury, as the case may be; and the value so fixed, or the value agreed upon by the parties, shall be deducted from the share of such heir, or heirs"—(Aik. Dig. s. 16, p. 155, 156.)

In the case before us, we are informed by the record,

that four of the five commissioners appointed by the Orphan's court, to divide and distribute the personal estate of the defendant's intestate, ascertained the value of the advancements of the several distributees brought into hotchpot. In doing this, it is conceived that the commissioners transcended the legal duties of their office, not the less, because, the court appointing them, undertook to confer such an authority. The statute, itself, delegates the power to the judge of the "County court," as a judicial officer, and does not authorise him to substitute others to act in his stead, except so far as it permits him, in his discretion, to cause a jury to be impaneled. In departing, then, from the course of procedure prescribed by the law, we think there is error in the proceedings of the Orphan's court.

3. In rendering a decree, and directing the issuance of an execution against the plaintiff, the Orphan's court exceeded its authority, for the law is entirely silent in such a case. The act of eighteen hundred and thirty, "to extend the powers of the County and Orphan's court in certain cases, and for other purposes," declares, that "all decrees made by the Orphan's court, on final settlements on the accounts of executors, administrators and guardians, shall have the force and effect of judgments at law, and executions may issue thereon, for the collection of the several distributive amounts, against such executor, administrator or guardian—(Aik. Dig. s. 37, p. 252.) This act, it is clear, does not extend to authorise the rendition of decrees and the award of executions thereupon, against distributees for balances against them on distribution; yet, it is the only statute which affords the semblance of aid, to legalise the proceeding before us.

The State *vs.* Wisdom.

In every view in which the case has presented itself to us, we think the decree of the Orphan's court is erroneous, and it is therefore reversed.

THE STATE *vs.* WISDOM.

1. The general rule on the subject of permitting testimony to be given of matters not alleged, is, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue.
2. On an indictment for stealing a slave, evidence is not admissible of conversations, held by the prisoner, with other slaves, eighteen miles from the place where the offence is charged to have been committed.
3. Though the *fact*, that such prisoner was at a particular place, not far distant from the point where the crime was perpetrated, might be shewn, in order to trace him, step by step, to the place where the larceny was committed.
4. But evidence of any act, by the prisoner, or his general conduct, not connected with the crime, should not be received.
5. Evidence offered by a prisoner, of his assertion of a claim to property stolen, when he was arrested, cannot be received—such a claim must be asserted before, or at the taking, to enable the defendant to give evidence of his own declaration, and the *bona fides* of the assertion, is for the consideration of the jury.
6. An instrument of writing, produced in pursuance of notice to that effect, may be read by the party who has required the production; but if he does not choose to give it in evidence, the mere notice will not have the effect to allow the party in whose possession it has been, to read it without proof.

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7. The stealing of a slave, cannot be established in any other or different manner, than the stealing of any other chattel endowed with volition, and the power of locomotion. Nor can an individual commit larceny in one county, who is at the time of its commission in another, and who is not near enough to assist those who are active in its perpetration.
8. An individual to whom a slave is hired, is *pro hac vice* the owner of the slave, during the term for which he is hired, and may be described as such, in an indictment for stealing the slave; but the insertion of the true owner's name, in an indictment, will not render the proof irrelevant. The indictment may be supported, by proof of possession by the person hiring the slave.
9. There is no repugnance, in charging the ownership of the slave in different persons, in different counts of the same indictment.

Indictment for negro stealing, tried before *Harris, J.*

The prisoner was indicted for negro stealing, at a term of the Circuit court of Dallas county: on his application, the venue was changed to Wilcox county, where he was tried, convicted, and sentenced to death, by the Circuit court of the latter county. Several questions were reserved by the presiding judge, for the consideration of this court, which may be stated in the following order:—

1. A witness was introduced on behalf of the State, who testified, that about the first of April, a few days before the larceny charged in the indictment was committed, he saw the prisoner on several different days, at Athens, in Dallas county, about eighteen miles distant from the place from whence the negro was stolen: that the prisoner was a stranger there, and had no apparent or ostensible business: that he saw the prisoner, on one

occasion, holding a long conversation with a negro slave belonging to the witness, whilst no white person was present, and that when the witness went to the place where the prisoner and the slave were conversing, the former ceased the conversation with the slave: and that he also saw the prisoner, on another occasion, holding a private conversation with another slave, in the same town, shortly after.

This evidence was objected to by the prisoner; but his objection was overruled.

2. Another witness, on behalf of the State, testified, that after the negro charged to have been stolen, had been some time missing, he traced him to Mississippi, and found him at a mill belonging to the prisoner; about eight miles distant from which, he found the prisoner himself. There was no evidence adduced on the part of the State, either of the acts or declarations of the prisoner, when he was arrested. The prisoner's counsel then proposed to ask the witness, if, when he was arrested, the prisoner did not claim the negro as his own property, and whether he did not then produce a bill of sale, made by one John Martin, to him. The court refused to permit these questions to be answered. The prisoner's counsel then proposed to offer in evidence the said bill of sale, without producing any proof of its authenticity: but the court refused to permit it to be given in evidence. It was then shewn, that the prisoner had received notice, from the solicitor, to produce said bill of sale on this trial. The court then ruled, that as the State had not offered the bill of sale as evidence, and as

no facts or circumstances were shewn, relative to its authenticity, the prisoner could not give it in evidence.

3. A witness testified, on behalf of the State, that the prisoner, about the ninth day of April, eighteen hundred and thirty-eight, between ten and eleven o'clock in the day, was discovered by him near where the negro slave, Dick, was at work, about sixty feet from him: the prisoner was on a horse, apparently turning off from the place where Dick then was: that the prisoner then immediately went to a field, about three hundred yards distant, where a negro slave, named Peter, (who was stolen at the same time,) was at work, and rode up to the fence, near where Peter was: the negroes were missing about eight o'clock of the night of the same day. Another witness testified, that at some time in the spring of the year, eighteen hundred and thirty-eight, the prisoner arrived about eight o'clock in the morning, at his house, which is about forty miles distant from Cahawba, and in Perry county: that the prisoner had two negroes with him; one of them was the slave Dick, and the other the witness described, as other witnesses described Peter. There was no evidence that the prisoner was seen with the negroes in Dallas county, after ten or eleven o'clock of the day of the night during which they left Cahawba. The prisoner's counsel requested the court to charge the jury, that unless they believed the prisoner was in company with the negroes in Dallas county, at the time, or after they left Cahawba, he could not be indicted in Dallas county, and therefore, they should acquit him. The court refused to give this charge, but instructed the jury, that if they believed the prisoner had concerted with the

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negro, to go off with him to Mississippi; and the negro, in pursuance of such concert, had left the possession of his master, and was then under the direction, and was acting under the control of the prisoner; they were authorised to infer, the negro was in his possession from the time he left the possession of his master, although the prisoner might have been in Perry county.

4. James M. Lenoir testified, that the negro, Dick, mentioned in the bill of indictment, was the property of Matilda Lenoir: that he was her guardian, and that at the time when the larceny was committed, the negro was hired to Charles G. Edwards.

5. The prisoner moved to quash the indictment, because the counts were repugnant to each other, in charging the slave to belong to different individuals; it being stated in one count, as the property of James M. Lenoir; in another, as the property of Matilda Lenoir; and in a third, as the property of Charles G. Edwards; which motion the court overruled.

Attorney General, for the State.

GOLDTHWAITE, J. — The correctness of the several decisions made by the Circuit court, on the questions reserved by it, will be considered in the order in which they are presented.

1. The general rule on the subject of permitting testimony to be given of matters not alleged, is, that nothing shall be given in evidence, which does not directly tend to the proof or disproof of the matter in issue. A leading case, illustrative of this principle, is cited in Philips'

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charged as drawers of the bill, in default of payment, they would be liable, without notice of non-payment, as it was their duty to provide for the payment of the bill, and they must have had knowledge that it was unpaid. The reason of the law, in requiring notice, falls, in such a case—(See Chitty on Bills, 355, and cases there cited.)

The last assignment of error is not sustained by the record. The motion for a new trial is refused, on condition that the plaintiff below enter a *remittiter*, which, from the record, it appears the plaintiff agreed to.—Should the clerk issue execution for the whole amount of the judgment, the remedy would be, to supersede the execution.

The judgment is affirmed.

Teat vs. Lee, adm'r.

TEAT vs. LEE, adm'r.

1. In distributing an estate, where parties in interest will not, or are incapable of consenting to an adjustment, the administrator should obtain permission to sell so much of the estate, as will enable him to make an equal division.
2. The statute (Aik. Dig. 155,) delegates power to the judge of the County court, where the parties cannot agree, to ascertain, by testimony, the value of property brought into hotchpot, as a judicial officer; or to cause a jury to be impaneled for that purpose. It is error, therefore, for commissioners to make the valuation, or for the court to confer authority to that effect.
3. The law nowhere authorises the rendition of decrees, and the award of execution thereon against distributees, for balances against them on distribution.

Error to the County court of Lowndes.

Decree for equalising distribution.

In this case, the Orphan's court appointed commissioners to divide the personal property—the estate being clear of debt. They were ordered to value advancements under the law of hotchpot. The commissioners divided the estate, and charged the plaintiff with seven hundred and ninety-two dollars, and seventy cents, to be paid to the administrator, for the purpose of making the shares of the other heirs equal to that of plaintiff.

Upon this report, judgment was rendered in favor of the administrator for that amount, and execution ordered. There was no final settlement or division of the estate.

Plaintiff in error assigned—

1. The court had no power to appoint commissioners to divide the estate brought into hotchpot. The commissioners could not value the advancements.

authors on evidence, and may be stated thus: If produced on the motion, it may be read by the party who has requested its production, but if he does not choose to give it in evidence, the mere notice will not have the effect to allow the party in whose possession it has been, to read it without proof—(2 Starkie on Ev. 360.) A different rule would produce the result of making evidence, by the mere act of notice; and a false instrument might be introduced, which it would be difficult, if not impossible, to disprove.

3. The most important question presented, is the one arising out of the charge of the court. It assumes that the prisoner could commit a larceny in Dallas county, although he may not have been there when it was committed. The charge requested was, "that unless the jury believed the prisoner was in company with the negroes in Dallas county at the time, or after they left Cahawba, he could not be indicted in Dallas county, and therefore, they should acquit." The instructions given were, "that if they (the jury) believed the prisoner had concerted with the negro to go off with him to Mississippi; and the negro, in pursuance of that concert, had left the possession of the master, and was then under the direction, and was acting under the control of the prisoner, they were authorised to infer that the negro was in his possession from the time he left his master, although the prisoner might have been in Perry county." To determine whether these instructions were correct, resort must be had to the statute: this provides, "if any person shall steal any negro or mulatto slave whatsoever, out of, or from the possession of the owner or overseer of

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such slave; the person or persons so offending, shall be, and are hereby declared to be felons, and shall suffer death."

There is no new rule introduced by it, from which we can presume that the general assembly intended to provide that the stealing of a slave should be established in any other or different manner, than the stealing of any other chattel endowed with volition and the power of locomotion. Most of our sister States, possessing this description of property, have deemed it essential to the interests of their citizens, to make the inveigling or enticing slaves from their owners, high offences. It must be evident to all, that in many cases besides mere larceny, slaves may be wholly lost to their owners, by the acts or contrivances of others; and we cannot doubt the propriety of some amendment to our criminal code, in this particular. Our duty, however, is performed, when we decide on the laws as they exist, without suggesting alteration or change. To constitute larceny, there must not only be a taking, but a *carrying away*. A bare removal, however, from the place where the goods are found, though the thief does not make off with them, is a sufficient asportation or carrying away—(4 Blacks. Com. 231.)—As, for instance, if a man be leading another's horse out of a close, and be apprehended in the fact. It must not be supposed, that a literal interpretation is to be placed on the term, carrying away: if one entice a horse, hog, or other animal, by placing food in such a situation as to operate on the volition of the animal, and he *assumes the dominion over it, and has it once under his control*, the deed is complete: but if we suppose

him detected before he has the animal under his control, yet after he has operated on its volition, the offence would not be consummated. In the case of slaves, which not only possess volition, and the power of locomotion, but also intelligence, a further extension of the principle is called for, and must necessarily be introduced into the law of larceny. It cannot be supposed, that the legislature intended only to punish those who forcibly took possession of the slave, as well against his, as his master's will: it was, without doubt, considered, that in many, perhaps most cases, the stealing would be effected by operating on the will of the slave. In such a case, *actual control*, at the instant of stealing, would never be exhibited. The same rules which apply to principals in the second degree, will, when examined, seem to afford the most direct analogies to cases of this description. It is not necessary that the party should be actually present, or even an eye witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise—(Foster, 347; Rex vs. Borthwick, 1 Doug. 207; Rex vs. Owen, R. & M. 96.)—but he must be sufficiently near to give assistance—(Rex vs. Stewart, R. & R. 363)—and the mere circumstance of a party going towards a place where a felony is to be committed, with intent to aid and assist in carrying off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless at the time of the felonious taking, he were within such a distance as to be able to assist in it—(Rex vs. Kelly, R. & R. 421.) And although an act be committed in

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pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals—(Rex vs. Sears, R. & R. 25; Rex vs. Davis, *ibid.* 113; Archbold's C. L. 4 a.)

If it is admitted, that the slave departed from the service of his master, in consequence of a concerted plan between the prisoner and himself, that the former might steal him, and that the latter would join him in Perry county, the offence was not consummated until the prisoner was sufficiently near the slave to aid him, if pursuit was attempted; or so near as to be capable of taking actual control over him;—if, then, his will consented to the act, the larceny would be complete, and the prisoner subject to the punishment: until then, it could not be, because both the slave and himself might have repented; and the one have returned to his master, the other to his home.

Although the evidence was sufficient to warrant the strongest presumptions that the prisoner was with the slave in Dallas county, and could perhaps only be satisfactorily rebutted by establishing an *alibi*, the law does not authorise the charge given, because *an individual cannot commit a larceny in one county, who is, at the time of its commission, in another, and who is not near enough to aid and assist those who are active in its perpetration.*

4. The next question is not very distinctly presented; it seems, however, to be this: whether the possession of one to whom a slave is hired, is the owner, within the meaning of the term, as used in the statute. Such an individual is *pro hac vice* the owner of the slave, during

the time for which he is hired, and may therefore be described as the owner. But we by no means wish to be understood as deciding, that, in such a case, the insertion of the true owner's name in the indictment, would render the proof irrelevant, or that such an indictment might not be supported by proof of possession, with the person hiring the slave.

5. The last question referred, may be shortly answered; that there is nothing repugnant in charging the ownership of the slave in different persons, in different counts of the same indictment. This was a precaution which is always advisable under similar circumstances.

For the error in admitting the evidence stated in the first point referred, as well as for the erroneous charge,—the judgment of the Circuit court is reversed, and the case is remanded, with instructions to cause the prisoner to be tried in due course of law.

Beal & Bennett vs. Snedecor.

BEAL & BENNETT VS. SNEDICOR.

1. Where defendants are described as "late merchants, partners, &c.," it is to be inferred, that the co-partnership ceased to exist, before the commencement of the suit.
2. And where a partnership has ended, service of process upon one of the partners, cannot operate as a service upon the other members of the firm.
3. But where both defendants appear, and judgment is rendered against them, advantage cannot be taken of the irregularity of the service.
4. The general issue in assumpsit, may be pleaded by one of several defendants, in an action against defendants, who were at a former time partners.
5. A plea to an action by the assignee of a note—that the note has never been assigned, and is still the property of the payee, must be verified by the oath of the defendant, swearing that he verily believes the assignment to be forged—and until this is done, plaintiff need not prove the assignment.

Error to the Circuit court of Greene.

Assumpsit on a promissory note.

The defendant in error, as the endorsee of Messrs. Brewster, Solomon & Co., brought an action of *assumpsit* against the plaintiffs, in the Circuit court of Greene; and in his declaration, as well as writ, described the plaintiffs as "late merchants, doing business under the name, style and firm of Beal & Bennett."

The cause of action was a promissory note, in these words:

"\$974 38-100.

New York, Aug. 23d, 1836.

"Twelve months after date, we, the subscribers, of

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Erie, State of Alabama, promise to pay to the order of Messrs. Brewster, Solomon & Co., nine hundred and seventy-four 38-100 dollars, for value received.

(Signed,)

BEAL & BENNETT."

In the declaration, it was stated, that the defendant in error was the endorsee of the note, and that by the endorsement, "the said Brewster, Solomon & Co., then and there, ordered and appointed the said sum of money, in the said promissory note specified to be paid to the said plaintiff, &c."

The only service of the writ, appearing on the record, was endorsed on the process, as follows:

"We acknowledge the legal service of this writ.

BEAL & BENNETT.

Aug. 26th, 1837."

In the Circuit court, James A. Beal, one of the plaintiffs in error, appeared and pleaded—

First—*Non-assumpsit*, in due form; and

Secondly—That the defendant in error was not the owner of the note sued on, or any part thereof, at the time of the commencement of the action, but the same was then, and still was, the property of Messrs. Brewster, Solomon & Co.

To these pleas, the defendant in error demurred; and his demurrer being sustained, and the plaintiffs declining to plead over, a judgment by *nil dicit* was rendered against them, in which it was recited, that the parties came by their attorneys, &c. "and the court being satisfied that service of the writ had been accepted by James A. Beal, who, in accepting the service, signed the name of Beal & Bennett, as it appears on the writ, and the de-

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fendants saying nothing further in bar or preclusion of the plaintiffs said action against them. It is considered by the court, that the plaintiff recover of, and from the said defendants, the sum of one thousand and seventeen dollars, and sixty-eight cents, the damages in the declaration mentioned, besides his costs in this behalf expended," &c. The case was entitled, at the head of the entry of judgment, "Isaac C. Snedikor vs. James A. Beal and Washington W. Bennett."

COLLIER, C. J.—From the terms in which the connection between the plaintiffs is stated upon the record, it is clearly inferrable, that it had ceased to exist before the commencement of the action. They could not, with propriety, upon any other *hypothesis*, have been described as "*late merchants, partners,*" &c. The case of Duncan vs. Tombeckbee Bank, (4 Porter's R. 185,) is directly in point, to show that such is a just interpretation of the terms.

The partnership, then, being at an end, the service of process on one of the plaintiffs, would not have operated as a service on both, within the meaning of our statute—(Alk. Dig. s. 57, p. 268; Duncan vs. Tombeckbee Bank, 4 Porter's R. 184.) It was even doubted, at one time, whether, during the existence of a copartnership, it was competent for one partner, without the concurrence of the others, to enter an appearance for the firm; unless all its members were served with process—(Hills vs. Ross, 3 Dall. R. 331, *dicta* of Chase and Iredell, justices; Taylor vs. Coryell & Co. Gow. on Partnership, appendix, 483.) But it never has been supposed, so far as our re-

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search extends, that a partner possessed this power after the dissolution of the partnership, as it respects antecedent contracts. The law is clear, that the authority which exists during the continuance of a partnership, from one partner to bind his co-partner, ceases on its dissolution. Indeed it would be a hardship to put a retired partner in the power of his late co-partner, by authorising the latter to pledge his credit *directly*, or to make him a party defendant to suits without his consent. Such an authority would be well calculated to discourage all enterprise, depending for its successful prosecution, upon the association of capital.

We have, then, no hesitation in concluding, that the acknowledgment of service of the writ by Beal, could not have the effect to bring Bennett into court; but the *entry of the judgment shows, in totidem verbis*, that both the plaintiffs in error appeared, though but one pleaded; so that it is immaterial what may be the truth in this respect, the record is conclusive on the point, so far as the action of this court is concerned. The plaintiffs being concluded by their appearance, there was no necessity for the introduction of evidence by the defendant, to show in what manner process was served; and though it was irregularly served, as to Bennett, the form of the judgment, as already shown, precludes him from taking advantage of the irregularity.

In respect to the pleas, it will be observed, that the demurrer, whether intentional or not, objected to both, as insufficient in point of law, and was sustained to both. The first plea is *non-assumpsit*, in usual form. True, the plea is pleaded by Beal alone, and denies that he un-

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dertook and assumed in manner and form, as the plaintiff in his declaration alleged. The declaration charges him, as co-partner of Bennett, with having made the promissory note, and the note itself is *prima facie* evidence of his assumption, and throws on him the necessity of making good his defence by proof. To this plea, then, there is not the slightest objection; and we can only account for its having been demurred to, and the demurrer sustained, by its not being noticed, either by the counsel for the defendant, or the court. The second plea, we think, cannot be maintained. The act of eighteen hundred and nineteen, "to regulate the proceedings in the courts of law and equity in this State," enacts, "when any suit shall be instituted by any person or persons, as assignee or assignees of any bond or other writing, it shall not be necessary for the plaintiff or plaintiffs to prove the assignment or assignments, unless the defendant or defendants shall annex to a plea, denying such assignment or assignments, an affidavit, stating that such defendant or defendants verily believe that some one or more of such assignments were forged, or make oath to the same effect in open court, at the time of filing such plea"—(Aik. Dig. s. 144, p. 283.) The direct tendency of the plea is, to controvert the endorsement of the note to the defendant in error, and in fact denies the allegation in the declaration, in which title is deduced from Messrs. Brewster, Solomon & Co. The term *endorsement ex vi termini*, when used in regard to commercial paper, implies a transfer, by writing thereon the name of the payee, or other subsequent party, in whom the legal interest is vested; and when it is said that the contents of

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a note or bill *are ordered and appointed to be paid to a particular individual*, we are to understand that there is an express direction of the payment, or an assignment of title to him by the person endorsing—(Clawson *vs.* Gaston, 2 South. R. 321; Tyler *vs.* Binney, 7 Mass. R. 479; Lovell *vs.* Evertson, 11 Johns. Rep. 52; Norris *vs.* Badger, 6 Cowen's R. 449; Dugan *vs.* U. S. 3 Wheat. R. 173, 183.)

The second plea, as it puts in issue the fact of the assignment, should have been *verified by affidavit*, or have been sworn to in open court; neither of which modes of verification seem to have been observed; and it is bad in substance.

We will not enquire how far the matter of the plea presents an available defence, inasmuch as the point was not argued; nor will we consider whether it is bad, as stating facts, which, if a legal bar, are admissible under the *general issue*. These questions, we leave for future adjudication. For sustaining the demurrer to the first plea, the judgment is reversed, and the case remanded.

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MORDECAI VS. BEAL.

1. The best evidence the subject admits of, must always be produced; and if evidence of an inferior grade is offered, it raises the presumption, that the higher testimony is withheld for some sinister purpose.
2. Before evidence of an inferior grade is permitted to be adduced, the court will require satisfactory proof that better evidence is not voluntarily withheld; and the sufficiency of such proof is a question for the discretion of the court, to be governed by the circumstances of the case.
3. Where a party proved, that a deed under which he claimed a personal chattel once existed, and was in the possession of one who had intermarried with the grantee of the deed, and resided beyond the limits of the State; that the deed had been demanded, but not produced; that enquiry had been made without effect of other persons, who, it was supposed, might have possession of it; and where there was an offer to prove its contents by a registered copy,—it is sufficient—and inferior evidence of the contents of the deed may be admitted.
4. The assent of an executor to a legacy, vests in the legatee the legal title,—the assent having relation to the will, the source of the legatee's title.
5. But an executor cannot, by any act under pretence of assent, enlarge or abridge the title of the legatee.
6. Where one, by his will, appointed certain agents to make a division of his personal estate, and in case of the death of either of them, authorised the survivor to appoint others in the place of those deceased, to assist in making the division—a recital contained in a paper, purporting to be the evidence of such division, and made by agents purporting to have been appointed by the survivor, is not sufficient evidence of the fact of the appointment. Proof of the fact, against one not claiming under the paper, purporting to be a division, must be made by evidence *aliunde*.

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Error to the Circuit court of Mobile.

Detinue for a slave, tried before Judge *Paul*. Verdict and judgment for plaintiff.

On the trial of this case, plaintiff below offered in evidence a copy of the will of Nathan Beal, and a paper, a copy of which is attached, marked A, purporting to be a division of the property mentioned in the will. He also proved, that he was the person called James A. Miller, in the will; and that the negro sued for, was one of the negroes named in the will; and that the plaintiff was not twenty-seven years old at the commencement of the suit; and that the negro was in possession of defendant, when the suit was brought. He also proved by B. S. Smoot, that the paper signed by him, and marked A, was made at his house, in Mobile, on the day it bears date; and it was admitted that no one of the negroes was present at the time, and that none of them were ever shown to the persons who signed said paper before or afterwards. Upon this proof, the plaintiff rested.

Defendant then offered to prove by John Phillips, that after the making of the will, and in the life time of Beal, the testator, he was present at the house of said Beal, in Washington county, when he, said Beal, sold and delivered the negro sued for, with several others, to Sarah Garnet, who received possession of the same, and retained the same during the life time of said Beal. That Beal died in eighteen hundred and eleven, or eighteen hundred and twelve, and that Sarah Garnet continued in the possession of the slaves, until eighteen hundred and thirteen, when she intermarried with John S. Devin, who took possession of the negroes in right of his wife,

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and retained the possession thereof, until eighteen hundred and sixteen, or eighteen hundred and seventeen, when he sold the negro in this suit mentioned, to Thomas J. Strong, who retained possession thereof, until eighteen hundred and twenty-one, when he died. Plaintiff's counsel asked the witness, if there was any deed of the sale of said negroes, to said Sarah Garhet, and upon his answering in the affirmative, the court excluded the testimony offered, until the deed should be produced, or its non-production accounted for. To this decision, defendant excepted.

Defendant then offered to prove, that enquiry had been made of John S. Devin, for the deed, who could not produce it. He also offered to read an affidavit of John S. Devin, that the deed was mislaid, and to prove that Devin was in Florida, beyond the jurisdiction of the court; and also that enquiry had been made of other persons, who might be presumed to have the deed, and that it could not be found. Defendant also offered a copy of the deed, taken from the records of Washington county, and a witness to prove that the copy was a correct transcript of the original. The court declined receiving the evidence, as insufficient to prove the loss of the deed; to which defendant also excepted.

Defendant then moved the court to instruct the jury, that if the property in question was held adversely to the claim of the defendant, at the time the paper purporting to be signed by Smoot and others was made, that the paper was void, and gave no right to the plaintiff. This the court declined, and instructed the jury, that the paper operated as a legal division of the property; to which defendant excepted.

The will was dated on the twenty-eighth of March, eighteen hundred and nine, and declared, that for the natural love and affection, the testator had towards Sarah Garnet, and Jacob Garnet, and James Augustus Miller, and any other children the testator might have by Sarah Garnet, "I give and grant them the following negroes, accounts, notes, &c., viz. one negro man named Dick, one negro Joe, one boy named Ned, one boy named Cupid, one boy named Jack, one woman named Rose, one named Minerva, one girl named Hetty, together with their increase; and also the stock of horses, cattle, and hogs, together with the bonds, debts, and book accounts, that are due me,—to be equally divided between Sarah Garnet, and the children I may have by her, and James Augustus Miller and Jacob Garnet; but it is to be understood, that at the death of the said Sarah Garnet, she is to give her part of the property to the children she may have by me; and if Sarah Garnet has no other children by me, then, at her death, the above named property is to be divided between James A. Miller and Jacob Garnet.

I authorise Lemuel Henry, Sarah Garnet and Thomas J. Strong, my agents, with full power to collect my debts, and make the distribution above stated; and if one or more of them should die, the surviving agent shall have power, and is required to appoint two more agents to execute the trust herein confided," &c.

The paper, marked A, and submitted in evidence by plaintiff, was as follows:

"Whereas by the last will and testament of Nathan Beal, deceased, late of Washington county, the said Na-

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than Beal appointed his wife Sarah, and Lemuel Henry and Thomas J. Strong, to execute the same, with the provision, that if any two of them should die, then, in that case, the survivor was authorised and required to appoint two other persons in their room, place and stead; and whereas the said Lemuel Henry and Thomas J. Strong, have, since the death of the testator, departed this life, and the surviving executrix, Sarah, (now Sarah Devin,) has, with John S. Devin, her present husband, proceeded, under the directions of the said last will and testament, to nominate and appoint; and they have nominated and appointed Benjamin S. Smoot and Samuel H. Garrow, to act with her and the said John S. Devin, under the said last will and testament, as executors thereof, and to execute the same. Now, therefore, know, &c. that we, the said Sarah, (now Sarah Devin,) John S. Devin, Benjamin S. Smoot and Samuel H. Garrow, have proceeded, under the authority given by the said last will and testament, to divide the property therein mentioned, as therein directed; and we have assigned to James A. Beal, mentioned in said last will and testament, by the name of James Augustus Miller,—to hold, to him and his heirs and assigns forever, as of his and their own property,—that is to say, one negro man named Ned, one negro man named Cupid, one negro man named Joe, one negro boy named General, one named Casey, one named Bob, one negro woman named Minerva, and one negro woman named Rose, and child.

“In testimony of all and singular the premises, we have hereunto subscribed our names and affixed our

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seals, this eighteenth day of October, A. D. eighteen hundred and thirty-five. (Signed,)

Witness :

"Charles E. Crane,

"David Nolan, -

"Charles A. Henry."

"SARAH DEVIN, [L. s.]

"J. S. DEVIN, [L. s.]

"BENJ. S. SMOOT, [L. s.]

"S. H. GARROW, [L. s.]"

The copy of the deed, or bill of sale, taken from the records of the County court of Washington county, offered in evidence by defendant, and excluded by the court, was as follows :

"Washington county, Mississippi Territory :

"Know all men, by these presents, that I, Nathan Beal, of the said county, for, and in consideration of the sum of two thousand eight hundred and seventy-five dollars, to me in hand paid, before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, have bargained, sold and conveyed, unto Sarah Garnet, of said county, eleven negroes, viz., Robert, Rose, Jack, Lucinda, Joseph, Dick, Ned, Hetty, Cupid, Nancy and Dinah, to have and to hold said negroes, to said Sarah, her heirs and assigns forever, against me, my heirs, executors, administrators and assigns.

"In testimony whereof, I have hereunto fixed my hand and seal, this ninth of June, eighteen hundred and ten. In presence, &c.

(Signed,)

"NATHAN BEAL, [L. s.]"

ORMOND, J.—Two questions arise in this case :

First—Was the preliminary evidence offered by the plaintiff in error, on the trial in the court below, sufficient to authorise the introduction of secondary proof of the contents of the deed ?

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Secondly—Was the paper executed by Smoot and others, a legal division of the slaves?

The rule of law is, that the best evidence which the subject admits of, must always be produced; and if evidence of an inferior grade is offered, it raises the presumption, that the higher testimony is withheld for some sinister purpose. Before, therefore, testimony of an inferior grade is permitted to be adduced, the court to whom the preliminary enquiry is addressed, will require satisfactory proof, that the better evidence is not voluntarily withheld.

What shall constitute this satisfactory proof, to authorise the introduction of secondary evidence, cannot easily be reduced to any fixed rule; it is addressed to the discretion of the court, to be governed by the circumstances of the case. The plaintiff here proved, that the deed once existed, and was in the possession of one John S. Devin, who had intermarried with the grantee of the deed; that the deed had been demanded from him, and that he did not produce it; that he now resided in the territory of Florida. It was also proved, that search and enquiry had been made for the deed, of other persons, who it was supposed might have possession of it, but without effect. We think this was sufficient. The plaintiff could have no motive for withholding it, as he offered to prove its contents by a registered copy, thereby repelling the presumption, that the original was withheld, for any improper purpose.

In addition to this, it is important to consider, that the plaintiff never had possession of the deed, and that Devin and his wife, who had once sold the negro in question,

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by virtue of a claim asserted under the deed, had afterwards, as executors of the will of N. Beal, assigned the same negro to the defendant. It is therefore not to be wondered at, that the deed is not produced on the demand of the plaintiff. It has been frequently held, that if an original paper is in the possession of a third person, beyond the jurisdiction of the court, and reasonable diligence has been used to procure it, without effect, secondary evidence of its contents may be resorted to—(Minor vs. Tillotson, 7 Peters' R. 99; United States vs. Rayburn, 6 Peters' R. 352; Baily vs. Johnson, 9 Cowen's R. 115; Scott vs. Rivers, 1 Stew. & Por. 19; 13 Johns. Rep. 58. The case of Bradford vs. Bradford, at the last June term of this court, establishes the same principle.

It results, from what has been said, that the court erred in not permitting secondary evidence to be given of the contents of the deed.

The division which was made of the negroes, as evidenced by the instrument signed by Smoot and others, is resisted on two grounds. First—That at the time of the division, the negroes (among whom was the one in controversy,) were not in the possession of the executrix, but held adversely, by one through whom the plaintiff in error claims; and that therefore being the transfer of a *chose in action*, it does not vest the legal title in the defendant.

The assent of an executor to a legacy, vests in the legatee the legal title; which assent has relation to the will, the source of the legatee's title; or, in technical language, he is said to be *in* by virtue of the will. This appears conclusively, from what is said in the case of Foster and

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Miles, cited in Saunders' case, (5 Coke's Rep.) "If lessee for years devise his term to another, and makes his executor, and dies, the executors do waste, and afterwards assent to the devise, in that case, although between the executors and the devisee, it hath relation, and the devisee is *in* by the devisor, yet an action of waste shall be maintainable against the executors."

The division which was made of the slaves, was not only the execution of a power created by the will, but is also evidence of the assent of the executor to the legacy, thereby vesting the legal title in the defendant in error.

We have been referred to the case of Loyd vs. Goodwyn, decided at the present term, (See page 237.) as determining this principle. The doctrine of that case, is, that the sale of a *chose in action*, where an adverse claim was asserted to the property, does not convey the legal title to the purchaser. Its applicability to this case is not perceived. An executor, by assenting to a legacy, cannot in any sense be said to sell or convey the subject of the legacy. His assent is not the source of the title. To ascertain what that is, recourse must be had to the will. It would be of most mischievous tendency, to admit that he could, by any act of his, under pretence of assent, enlarge or abridge the title of the legatee.

Secondly—That it does not appear, that Smoot and Garrow, who, with the executrix, and her husband, Devin, made the division of the slaves, had any authority to act: this objection is well founded. By the will of N. Beal, the power to make the division is given to the executrix, and Samuel Henry and Thomas J. Stroug; and, in the event of the death of either, power is given

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to the survivor, to appoint others in their place. It is true, that the instrument by which the division is made, recites that Strong and Henry are dead, and that Smoot and Garrow have been appointed by the survivor in their place and stead. But we do not think the recital was proof of the fact against one who did not claim under it. The proof of the fact, must be made by evidence *aliunde*.

Let the judgment be reversed, and the cause remanded.

Hanrick vs. the Farmers' Bank of Chattahoochie.

HANRICK vs. THE FARMERS' BANK OF CHATTAHOOCHEE.

1. Inland bills of exchange, in this State, are regulated and governed by the same laws, usages and customs, which regulate and govern foreign bills of exchange—except, in the amount of damages.
2. Damages, other than interest, are never given by the law-merchant, against an acceptor of a bill—as acceptor merely.
- [3. In England, the damages are estimated at the difference of exchange, and the expences of forwarding.]
4. The clerk of the court has no power to ascertain the damages, but on a writing ascertaining the plaintiff's demand.
5. Where the common money counts are added to a count on a bill of exchange—the clerk may compute the damages without entering a *nolle prosequi* to the common counts.
- [6. The decision (Minor, 18,) founded on the English decisions, overruled.]

Error to the Circuit court of Montgomery.

Assumpsit on note, tried by *A. Martin, J.*

This action was founded on a bill of exchange, dated March twelfth, eighteen hundred and thirty-seven, drawn by Whitman & Hubbard on, and accepted by defendant below, for ten thousand dollars, payable sixty days after date, to the order of Thomas W. Brame—made negotiable and payable at the Bank of Mobile—and endorsed by Thomas W. Brame, William S. Brame, and Walsh & Fitzpatrick—and protested for non-payment. The general issue was plead by defendant below, but withdrawn, and judgment rendered for plaintiffs.

Campbell, for plaintiff in error.

Hilliard, contra.

ORMOND, J.—This was an action of assumpsit, brought by the defendant in error, as the endorsee of a bill of exchange, against the plaintiff in error, as the acceptor of the said bill.

The declaration contains a special count on the bill, and the common money counts, for money had and received, and money paid, laid out and expended. The record further shows this entry of the judgment:

"This day came the parties, by their attorneys, and the defendant withdrawing his plea, says nothing in bar or preclusion of the plaintiff's action. It is therefore considered by the court, that the plaintiff recover of the defendant, the sum of," &c.

From this judgment, the defendant below has prosecuted a writ of error to this court, and now assigns for error—

1. That the declaration contains the common counts, and judgment was rendered without the intervention of a jury;

2. That the judgment is rendered for more money than is specified in the count on the bill.

The last assignment of error will be first considered.

The bill of exchange sued on, was for ten thousand dollars, and the judgment rendered was for eleven thousand, six hundred and fifty-three dollars; it is therefore manifest, that the clerk, in computing the damages, has assessed, besides the interest, ten per cent on the amount of the bill, as damages for non-payment; and the ques-

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tion is therefore presented, whether the acceptor of an inland bill of exchange, that is, one drawn within, and payable within the State, is liable to pay ten per cent damages, on protest for non-payment.

To understand the full bearing of this important question, it will be necessary to take a survey of all our statutes on the subject, as it is only by considering them as a whole, that a satisfactory result can be attained.

The act was passed in eighteen hundred and seven, and is entitled "an act to render promissory notes and cotton receipts negotiable, and for other purposes."

The first section makes promissory notes negotiable by assignment, as inland bills of exchange, and is, in substance, the same as the well known English act of Parliament, of the third and fourth of Anne, which was repealed in eighteen hundred and twelve.

The second and third sections, provide for the issuance of cotton receipts by the owners of gins, and make them assignable and negotiable, as promissory notes.

"Sec. 4. That when any person or persons shall, by order in writing, signed by his or her proper hand, direct the payment of any sum or sums of money, in the hand or possession of any other persons whatsoever, the money therein specified, shall, by virtue thereof, be due and payable to such person or persons to whom the same is drawn payable, and may be put in suit against the person or persons who may draw the same, or against the person or persons on whom the same may be drawn (after acceptance thereof,) by him or them to whom the same shall be made payable, and recover damages. *Provided, nevertheless,* that no person or persons whatsoever,

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shall prosecute any suit against any person or persons, who shall give such order for the money herein mentioned, before the same shall have been presented for acceptance, and notice given of the non-acceptance thereof to the drawer; or before the same shall have first been protested or non-accepted, and notice given thereof to the drawer, before such suit shall be brought; and if any suit shall be brought on any such order, before notice and refusal to pay as aforesaid, the plaintiff or plaintiffs shall be non-suited, and pay costs.

"Sec. 5. That all bills of exchange, hereafter to be drawn upon any person resident within the United States, and out of this Territory, which shall be returned protested, the damages of such protested bills, shall be fifteen per cent. on the sum drawn for; and all bills in like manner drawn upon persons resident out of the jurisdiction of the United States, being protested, the damages shall be twenty per cent. on the sum mentioned in the said bills respectively, and all charges incidental thereto, with lawful interest as aforesaid, until the same be paid.

"Sec. 6. Every bill of exchange, of the sum of twenty dollars and upwards, hereafter drawn in, or dated at and from any place in this Territory, upon any person or persons within the said Territory, and payable after a certain number of days, weeks or months after date or sight thereof, shall, in case of non-acceptance by the drawee, when presented for acceptance; or if accepted, in case of non-payment by the drawee, when due and presented for payment, be protested by a notary public, in like manner as foreign bills of exchange, and the

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damages on such bill, shall be ten per cent on the sum drawn for, and shall, in every other respect, be regulated and governed by the same laws, customs and usages, which regulate and govern foreign bills of exchange"—(See Toulmin's Dig. 67.)

In determining the effect to be given to this statute, we must consider it as a whole, and give it such a construction, as best comports with the intention of its framers, without laying undue stress on particular portions of it.

The counsel for the defendant in error, insists, that by the fourth section of the law above cited, the legislature intended to give damages of ten per cent against the acceptor, upon the non-payment of the bill; and it is probable that the section, standing alone, would justify such an inference. But, upon examination, it is quite apparent that the legislature did not intend, by that section, to do any thing more than to provide, that when an order was drawn, that the sum drawn for should be due and payable to the payee, and that he might maintain an action against the drawer or acceptor and recover damages, or in other words, (what, to be sure, was quite unnecessary,) to define what should constitute a bill of exchange. Having thus laid the foundation of the system, the legislature proceed, in the two succeeding sections, to determine in what manner the rights and liabilities of the different parties to the bill are to be ascertained—the amount of damages to be paid on the dishonor of a bill—and lastly, that inland bills shall in all respects, except the amount of the damages, "*be regulated and governed by the same laws, usages and customs, which regulate and govern foreign bills of exchange.*"

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Damages, other than interest, which may accrue, is never, by the law-merchant, given against an acceptor of a bill, as such merely; though cases may exist, in which he might be liable to the drawer, in damages on some special agreement, to accept the bill. But, as a general proposition, and for all the purposes of this case, it may be asserted, that he is not liable. His undertaking is absolute, to pay the money to the holder of the bill. Damages are given to the holder, to compensate for the loss and disappointment in not receiving his money at the place appointed, and arises out of the contract of drawing or endorsing the bill. In England, the damages are estimated at the difference of exchange and expenses of re-drawing, so as to enable the holder to place his funds where the bill should have been paid. But, be the reason of the law what it may, in allowing damages on the dishonor of a bill, it is certain, that, testing the case by the rule prescribed by the sixth section, (the *lex mercatoria*), no damages can be claimed against an acceptor; and it would be contrary to every sound rule of construction, to make the positive rule pointed out in the sixth section, yield to the mere implication which might be drawn from the fourth section, uncontrolled or unexplained by the language of the sixth. We are, therefore, of opinion, that damages cannot be recovered from the acceptor of an inland bill of exchange.

The remaining objection is, that where there is a special count on a promissory note or bill of exchange, (as is the case here,) and also the common money counts,—that it is error for the clerk to compute the damages, without a *nolle prosequi* being first entered on the common counts.

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In England, the practice is, under a rule of court, to require the clerk to assess the damages, a *nolle prosequi* being entered on the common counts. But the decision of this question does not depend on the English authorities, but turns exclusively on our statute. "In all actions founded on any writing ascertaining the plaintiff's demand, or sum sued for, if judgment by default, *nihil dicit*, or by *non sum informatus*, or on demurrer, be entered thereon, the court, where the same action shall be pending, shall and may lawfully enter judgment for the debt, demand and interest thereon, to be calculated by the clerk of such court, up to the time of rendering damages, without the intervention of a jury to enquire of the damages"—(Aik. Dig. 269.)

It will be seen by this act, that the clerk has no power to ascertain the damages, but on a writing ascertaining the plaintiff's demand, such as is described in the first count. The plaintiff in error, therefore, cannot, by possibility, be injured by the failure to enter a *nolle prosequi* on the common counts; as the only effect of retaining them, might be to debar the plaintiff below from recovering any claim, which might have been recovered under the common counts. The former decision of this court, to be found in Minor's Rep. 18, was founded on the English decisions, and is hereby overruled. The case of Knickerbocker vs. Colden, (2 Cowen, 31,) and of Beard vs. Van Wickle, (3 Cowen, 335,) were made under a statute of New York, different from ours, and therefore do not militate against the views here taken.

For the error of the court below, in rendering judgment for too much, the judgment is reversed, and this

court, proceeding to amend the same, directs that judgment be now entered for the amount of said bill of exchange, with interest thereon to the time of the rendition of the judgment of the court below, and that the plaintiff in error pay the costs of this court.

EVANS et al. vs. BOLLING.

1. Where the loss of an instrument proposed to be offered in evidence is satisfactorily proved, the law permits secondary evidence to be given of its contents.
2. The most unexceptionable mode of proving the contents of a lost instrument, is by a sworn copy; and where the copy is true, it is proof of the same grade, and entitled to the same credence as the original.
3. Where the subscribing witness handed a bond to the clerk, who copied it—the copy made by the clerk, is satisfactory evidence of the contents of the original.
4. But the subscribing witness cannot be allowed to refresh his memory, as to the contents of the lost bond, by reference to the copy made by the clerk.
5. A witness, *it seems*, may be allowed to refresh his memory, by looking at a memorandum he made at the time the occurrence took place, to which he is called to testify; but must swear, not from the fact of his having written it down, but to the fact itself.
6. Where one complains of an error in an inferior tribunal—to be entitled to redress—he must shew he is prejudiced by it.
7. But where a defendant, in order to make out a defence, proposes to show that the consideration of a bond sued on, is a bond which is lost, and in his effort to show the contents of such

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lost bond, is arrested by an improper decision of the court,—these facts sufficiently exhibit the pertinency of the proof, to authorise the action of this court.

Error to Sumter County court.

Debt on bond.

This was an action of debt, on a writing under seal, brought by the defendant in this court, against the plaintiffs. The pleas of *nil debet*, failure of consideration, and want of consideration, were filed, in short, by consent. There was a verdict and judgment for the plaintiff below.

On the trial below, a bill of exceptions was sealed, from which it appeared—That the defendants below offered to prove, that the bond sued on was executed in consideration of a bond executed by the plaintiff below, to Evans, for the sale of land and other property. The subscribing witness then proved that the bond had been executed by John H. Bolling to Frederick P. Evans.—Evans then swore that the bond was lost, and that diligent search had been made for the same, and that it could not be found—that no counterpart of the bond had been taken. The subscribing witness to the bond then proved, that he received it from the defendants without alteration, and handed it to the clerk of the County court, to be copied by him. The defendants then offered to show by the clerk, that he copied said bond as he received it from the subscribing witness, which copy was offered in evidence, not as a record, but to prove the contents of the lost bond. The subscribing witness never saw the bond after it was delivered to the clerk, and never compared the bond with the copy made by the clerk, and could not testify as to its contents.

The court held, that where there is a subscribing witness to a lost instrument, no other witness can be introduced to prove a copy of the bond, unless the subscribing witness recollects the contents of the instrument, and has compared the copy with the original. That to allow the clerk to testify that the copy was a true copy of the bond, as delivered by the subscribing witness, would be to admit hear-say testimony, although the clerk swore he had copied the bond as it came to him from the subscribing witness. The defendant then offered to introduce the subscribing witness, and to allow him to refresh his memory from the copy ; but the witness being asked if he had compared the copy with the original, and having answered in the negative, the court refused to allow the subscribing witness to refresh his recollection from the copy, and to testify, on the ground, that he had not compared it with the original bond.

These opinions of the court were excepted to, and assigned for error, in this court.

ORMOND, J.—The loss of an instrument of writing, proposed to be offered in evidence, being satisfactorily established, (as appears to have been done in this case,) the law permits secondary evidence to be given of its contents. The evidence thus substituted from necessity, for the original itself, must always be of a grade inferior to the original; and will fluctuate, as it is more or less certain, between the highest degree of probability, and mere doubt or suspicion. But certainly the proof of the contents of a lost instrument, by a sworn copy, must be the most unexceptionable mode of proving the con-

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tents of a lost instrument. It is indeed proof of the same grade, and would be entitled to the same credence as the original, if it were certain that the copy was true. In this case, the court seem to have considered, that the copy could not be read in evidence, because the clerk who made it, could not prove the execution of the original bond. But that circumstance merely imposed on the plaintiffs in error, the necessity of showing that the bond thus copied was the original; which was done by the evidence of the subscribing witness. If these witnesses are believed, the contents of the lost bond are satisfactorily shewn; and the court erred in rejecting the testimony.

But the court did not err, in refusing to permit the witness to refresh his memory, as to the contents of the lost bond, by reference to the copy made by the clerk.

The question commonly arises, in cases where a witness has made a memorandum of some transaction, or event about which he is called to testify: the memorandum is not evidence, but he may look at it to refresh his memory; and must then swear, not from the fact of his having written it down at the time,—but to the facts themselves. Now, in this case, the genuineness of the copy was not acknowledged; it could not, therefore, be referred to for any purpose as evidence.

It is contended by the counsel for the defendant in error, that the materiality of the lost bond does not sufficiently appear, to authorise this court to reverse for the rejection of the testimony. It is true, that when a party complains in this court of an error, he must show that he is prejudiced by it; and we think that sufficiently appears on this record. The defence set up was, that there

was no consideration for the bond sued on. To establish this, they offered to prove that the consideration of that bond, was another bond, made by the plaintiff below to the defendants, for the sale of land and other property. The first step in the defence, was to establish the execution and contents of the bond; and in attempting this, the defence was arrested by the court. It would have been idle, and indeed quite irregular, to have offered further proof, the preliminary proof not being allowed to be made, upon which the other testimony was to depend.

The judgment of the court below is reversed, and the cause remanded, for further proceedings.

Marshall & M'Leod vs. White.

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MARSHALL & M'LEOD vs. WHITE.

1. The only object of an enquiry of damages after a default, is the ascertainment of the amount to which the plaintiff is entitled—as every other matter is admitted by the defendant to be, as alleged in the declaration.
2. An action of trover cannot be commenced by attachment; which, can only issue on a money demand.
3. Where an attachment issues on affidavit of a money demand, a declaration subsequently filed in trover, against a defendant who does not appear, cannot be allowed.
4. But if defendant appear, and plead to the merits—he will be too late to review the irregularity, after judgment.

Error to Autauga Circuit court.

Trover, tried by *Harris, J.*

This action was commenced by process of attachment, issued by a justice of the peace, and returnable to the Circuit court of Autauga county.

At the return term, the plaintiff declared in trover for a slave, and the defendant not appearing, a judgment by default was rendered against him; but because the damages were unknown, a writ of enquiry was directed to be executed at the ensuing term. On the execution of the inquisition, damages, to the amount of nine hundred and seventy-two dollars, were assessed, for which sum judgment was rendered.

While the enquiry of damages was before the jury, the plaintiff proved, that the negro was in his possession before suit, and at the time of the alleged taking, and

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also proved the value of the slave : but offered no further proof. The defendants requested the court to instruct the jury, that as the plaintiff had failed to prove, that the slave had ever been in the possession, or under the control of the defendants; and had proved no demand, he was entitled to recover only nominal damages : this was refused; and the jury were charged, that the plaintiff was entitled to recover the value of the slave, (according to the proof,) and interest. To this the defendants excepted; and having removed the suit to this court, here assigned for error—

1. That the court erred in giving the charge stated ;
2. In refusing to give the one requested ;
3. That it erred in rendering the judgment ;
4. That the attachment was not issued, to recover for any demand authorised by law.

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Edwards, for plaintiff in error.

GOLDTHWAITE, J.—If we are to consider the enquiry of damages as a proceeding after a default, its only object is the ascertainment of the amount to which the plaintiff is entitled; as every other matter is admitted, by the default, to be, as alleged in the declaration. In this view, the instructions given by the presiding judge were entirely free from error; and those requested by the defendant were properly refused. The judgment, however, cannot be supported, because a suit in trover may not be originated by attachment.

There is nothing in the statutes, respecting this process, which authorises a belief, that the general assem-

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bly contemplated its issuance for any other than a money demand. Such seems to have been the idea conceived by the plaintiff, for he states in his affidavit, that the defendants are justly indebted to him in the sum of nine hundred dollars, after deducting all off-sets, &c. The proceeding subsequently, by a declaration in trover, is an error which vitiates the proceedings.

If the defendant had *appeared, and pleaded* to the merits, he would now be too late, to review this irregularity in this, or any other manner; but as the judgment was by default, and the defendant has by no act waived his rights, he must be permitted to avail himself of this error.

In *Cain vs. Mather*, (3 Porter's R. 224,) it was held, that on demurrer, the court ought not to look behind the declaration, to ascertain if it be sustained by the process. In that, as in this case, the suit was commenced by an original attachment; and, in both cases, the declarations are for *torts* sounding in damages merely. There, however, the defendant appeared,—and instead of pleading in abatement, or seeking to set aside the declaration for irregularity,—*demurred* to the cause of action as stated.

We think it might produce evil consequences of some magnitude, to decide, that a party suing out process of attachment to secure a money demand, is authorised to declare in any action which he deems expedient. Such a course would at all times leave an absent defendant entirely at the mercy of the plaintiff, as no other enquiry than the value of property named in the declaration would be before the jury, and as the default in all such cases admits the entire cause of action as stated.

Merrill vs. Jones.

Let the judgment be reversed back to the attachment, and the case remanded.

MERRILL vs. JONES.

1. An appeal or writ of error does not lie from an interlocutory order of the County court.
2. As a general rule, consent of parties cannot give jurisdiction to a court, which otherwise does not possess it.
3. A judgment of the Circuit court, on a writ of error, to revise an *interlocutory* order of the County court, though obtained with the consent of parties, will be set aside.
4. And where the proceedings in the Circuit court, might operate as a bar to a review of the same matters, when properly presented, after *final* judgment below—the proceedings will be set aside, and the writ of error dismissed.

Error to the Circuit court of Covington county.

Writ of error to the Orphan's court, tried by *Crenshaw, J.*

In this case, there were two assignments of error—one in the Circuit court, and another in this court. One of the distributees of the estate of an intestate, alleged in the County court of said county, that the administrator had not made a true and complete inventory of the personal property of the intestate, but had omitted to return sundry negroes and other property, and that the administrator had by force, carried away from the pre-

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mises of the deceased, the said negroes, without the consent of any one interested, &c.—to which the administrator plead, that the negroes aforesaid were not the property of the estate. A jury were empaneled to try the issue, who found the property to belong to the estate, and liable to distribution. The court, therefore, ordered the administrator to proceed, and make distribution of the property to the distributees.

From this judgment, the administrator appealed to the Circuit court, and assigned the following errors:

1. The judgment contains error, because, it appeared from the record, that there were other parties plaintiffs, not joined in the action;

2. It did not appear by the record, that the defendant had the notice required by law, to appear and answer;

3. Because the finding of the jury was general, and did not find any particular property, subject to distribution;

4. Because the judgment was equally uncertain;

5. It did not appear at whose instance a jury was empaneled;

6. There was no issue joined by the parties, for the action of a jury;

7. The record was erroneous, in form and substance.

The Circuit court considered, that there was no error in the record—and that the judgment of the Orphan's court should be affirmed; from which judgment, plaintiff in error took a writ of error to this court, and here assigned:

1. The Circuit court erred, in affirming the judgment of the County court.

2. The Circuit court had no jurisdiction, and should have dismissed the writ of error—there being no final judgment rendered by the County court.

Cook, for plaintiff in error.

GOLDTHWAITE, J.—The second assignment of errors, we think, is decisive of this case. It questions the jurisdiction of the Circuit court, and denies its authority to reverse or affirm the particular decree rendered by the County court on the matter then before it, because it is not a final judgment.

The statute provides, that from any judgment or order final, whether in vacation or term time, an appeal or writ of error shall lie to the Circuit or Supreme court, in the same manner as upon judgments of the Circuit courts —(Aik. Dig. 246.) It is, therefore, clear, if the judgment of the County court on the matter before it was interlocutory, and not final, that a writ of error or appeal, can not be rightfully presented; but it is supposed, that as the present plaintiff is the same who brought the cause before the Circuit court by writ of error, he ought not to be permitted, now, to question the jurisdiction of that forum, to which he has resorted for relief, when its decision is adverse to his wishes. The general rule is very clear, that consent of parties cannot give jurisdiction to a court which otherwise does not possess it, and the Supreme court of the United States, has in several cases considered it proper to dismiss cases from the court, which were brought there by writ of error, at the instance of the plaintiff in the court below, who must, of

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course, have been active in selecting the jurisdiction of the court. Thus, in *Winchester vs. Jackson*, (3 Cranch, 514,) the plaintiffs in error were also plaintiffs below. In *Sullivan et al. vs. The Fulton Steamboat Company*, (6 Wheat. 450,) the bill was filed by the complainant, without sufficient allegations to give jurisdiction, and on the appeal prosecuted by him, the decree of the court below, dismissing the bill *generally*, was affirmed, for the reason that the Circuit court had no jurisdiction; but the decree was modified, so as to be *without prejudice to the complainant on the merits*.

In the case of *Colden vs. Knickerbacker*, (2 Cowen's R. 31,) the Court of Errors and Appeals of New York dismissed a writ of error, and refused either to affirm or reverse, for a defect of jurisdiction; and the decisions of this court, have been uniform on this subject, in all cases where the writ of error is returnable to it—(*Johnson's adm'r vs. Henry*, Minor, 13; *Glover vs. Robinson*, *ibid.* 101; *McLaren vs. Allen*, *ibid.* 117; *Harris vs. Kreps*, *ibid.* 184.)

In a case like the present, an affirmance in the Circuit court, of a case of which it has no jurisdiction, might operate as a bar to a review of the same matters when properly presented, after a final judgment, and when, in consequence of such a judgment, the court would have obtained the jurisdiction, either by appeal or writ of error; therefore, a substantial reason exists, why such a judgment of affirmance ought to be set aside, and the proper one, dismissing the writ of error, should be given.

The judgment of the County court merely directs, that the administrator of the estate of Benjamin Merrill, de-

ceased, proceed to make distribution, according to the statute, of the slaves ascertained to belong to the estate. Whatever may be the merits or demerits of these proceedings,—so far as shewn, it is certain, that this decree was not a final settlement of the estate, as no distribution is actually made of it, among the distributees, nor is there any decree of a final settlement, ascertaining what is due to each distributee, or to the defendant in error, as the sole distributee.

The Circuit court, therefore, should not have entertained jurisdiction of the case, but should have dismissed the writ of error.

In proceeding to determine the cause on the errors assigned, an error was committed, for which the judgment of the Circuit court must be reversed, and the cause remanded, with instructions to dismiss the writ of error, unless the record shall be so perfected on *certiorari* or otherwise, as to shew a final judgment or decree in the County court.

Hosey, adm'r, vs. Brasher.

HOSEY, adm'r, vs. BRASHER.

1. Letters of administration are but evidence of authority, and an administrator may act without them, if the records of the court shew his appointment.
2. Where an order of the Orphan's court is made, requiring a defendant to appear in court, enter into bond, and take the necessary oaths as administrator; and in an order of publication, eighteen months afterwards, he is recognised as administrator: it will be intended that he complied with the previous requisitions, and took upon himself the administration.
3. *It appears*, that the law does not require either the bond or oath of an administrator to be recorded.
- [4. In England, an examined copy of the act-book; stating that letters of administration have been granted to a defendant, is proof that he is administrator—although no notice was given to produce the letters of administration.]

Error to Talladega Circuit court.

Assumpsit against an administrator, tried by Judge *Martin*.

The plaintiff in error was sued in the Circuit court of Talladega, as the administrator of James Brasher, senior, deceased, and pleaded (among other pleas) *ne unques administrator*. To disprove this plea, the defendants gave in evidence, a regularly certified transcript of the record of the Orphan's court of Talladega; from which it appeared, that the plaintiff applied for letters of administration on the estate of James Brasher, senior, deceased; that notices were issued according to law to the next of kin, to show cause why the application should not be

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granted—which notices having been served, and no cause shown, that court, on the first of September, eighteen hundred and thirty-four, ordered that letters of administration be granted to the plaintiff. On the same day, the court made an order of appraisement and sale, and that the plaintiff give bond, &c.

In April, eighteen hundred and thirty-six, the judge of the court made an order, requiring publication to be made in a newspaper for forty days, that the plaintiff would on the first Monday in June thereafter, present his accounts and vouchers, for allowance and final settlement, &c.

This is an abstract of all the evidence introduced, to show that the plaintiff was administrator, as charged by the defendants. The judge of the Circuit court determined that it was admissible; and on motion of the plaintiff's counsel for that purpose, refused to instruct the jury, that it was not sufficient proof of his being administrator.

Chilton, for plaintiff in error..

Phelan, contra.

Phelan, for defendant, thought the evidence was proper and competent, and proved that plaintiff in error was administrator, without notice to produce his letters—(2 Starkie's Ev. 553, and the authorities there cited. 1 Saunders' P. & E. 504; 8 East, 187; Butler's N. P. 246; 2 M. & S. 567.) Hence the refusal of the court to charge as requested, or to reject the evidence, was proper. The other matters appended to the order, granting letters, could not vitiate the order.

Hosey, adm'r, vs. Brasher.

COLLIER, C. J.—The admissibility of the evidence, and the charge of the court, presents the only question for our decision.

Our statutes certainly contemplate the issuance of letters of administration, to the person appointed administrator, yet, as the letters are but evidence of his authority, he might act without them, if the records of the court show his appointment, &c.

Whether a person appointed administrator, may be allowed to exercise his office, until he has been qualified by taking the necessary oaths, and entering into bond with sureties, is a question which does not necessarily arise in the present case. The transcript contains an order made the first of September, eighteen hundred and thirty-four, requiring the plaintiff to appear in court, and enter into bond and take the necessary oaths. And as he is recognised in the order of publication, of April, eighteen hundred and thirty-six, as administrator, we should intend that he complied with the previous requisitions of the court; the more especially, as the law does not require either the bond or oaths to be recorded.

It has been held, in England, that an examined copy of the act-book, stating that letters of administration were granted to the defendant, are proof that he is administrator, although no notice was given to produce the letters of administration—(See 1 Starkie's Evi. 248; 1 Saunders on Pl. & Evi. 504; Elden vs. Keddell, 8 East's R. 187; Davis vs. Williams, 13 East's R. 231; Gorton vs. Dyson, 1 B. & B. Rep. 219.) By the admission of the evidence in the case at bar, no injury could possibly result to the plaintiff;— if he had declined accepting or acting

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under the grant of administration, there could be no difficulty in showing it. In the absence of any such countervailing proof, the court should not have instructed the jury that the evidence was insufficient; and consequently, the judgment must be affirmed.

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1. On an appeal from the judgment of a justice of the peace, where the sum in controversy exceeds twenty dollars :—a declaration, or statement of the cause of action, is necessary.
2. And, in such a case, when the sum is not ascertained, a jury must also be impaneled to enquire of the damages.

Error to the Circuit court of Pike.

Appeal from a justice of the peace.

This action was commenced before a justice of the peace, by the defendant in this court, against the plaintiff. There did not appear to have been any judgment rendered by the justice, further than might be inferred from the appeal bond, which recited, that judgment was rendered for plaintiff below.

An appeal being taken to the Circuit court of Pike county,—at the Fall term, eighteen hundred and thirty-five, of that court, an order was made, referring the matters in dispute, to the arbitrament of S. M. Evans, whose award was to be made the judgment of the court.

At the next term of said court, a judgment, by default,

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was entered against the defendant below. From this judgment, a writ of error was taken to this court,—and the plaintiff assigns for error :

1. That no judgment should have been rendered against the plaintiff in error, without an issue and verdict ;
2. That the court had no jurisdiction.

Campbell, for plaintiff in error.

ORMOND, J.—On an appeal from the judgment of a justice of the peace, when the sum in controversy, (as in this case,) is more than twenty dollars, a declaration or statement of the cause of action, is necessary—(See *Roden and others vs. Roland*, 1 Stewart's Rep. 266, and cases there cited.) This has not been done in this case ; and for that error, as well as for rendering judgment by default final, when the sum was not ascertained, without impanneling a jury to enquire of the damages,—the judgment must be reversed, and the cause remanded.

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BETTIS, adm'r, vs. TAYLOR.

1. A statute imposing a penalty, must be strictly construed and closely followed, and the form of procedure, and the measure or description of proof prescribed, must be regarded.
2. The act which confers the right on a jury, to impose damages for vexatiously, or for delay, claiming property levied on under execution, (Aik. Dig. 168,) no where requires that the jury, in giving damages, shall express, by their verdict, the causes which influenced them.
3. *It seems*, that a party pursuing a summary remedy given by statute, must conform strictly to the terms of the act, and the conformity must be shewn by the record.
4. *Also*, that in such cases, when submitted to a jury, on an issue, essential facts will either be intended to exist, or will be considered waived:—if the record shew such a compliance with the statute, as is necessary to give the court jurisdiction.
5. Where an administrator detains possession of personal property, to which another has a paramount title, the owner need not proceed against him in his fiduciary character, but may charge him personally:—and the administrator, where the question is litigated in good faith, is entitled to be reimbursed his damages, from the assets of the intestate.
6. And the rule, that he who detains property from the rightful owner, is liable,—is so strict, that, where there are several executors, and one only has possession,—he alone can be sued.
7. And a defendant in *detinue*, is not allowed to give in evidence, as he might do in *trover*, that the property was delivered to him as a pledge.
8. Nor will it avail him, that the property was destroyed, or died after suit brought.
9. Thus, an administrator, who, as such, interposes a claim to property levied on by execution, will be liable, individually,

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for the forthcoming of the property, even if destroyed, or if it dies, after the claim is interposed, and the property goes into his possession.

10. *It seems*, that one, interposing such claim, as administrator, while incurring, by the stipulations of his own bond, personal responsibility,—might make good the issue on his part, by showing title in his intestate.
11. Where an administrator, in such case, is forced to expend money, to protect the estate of his intestate—the court that settles his accounts, can do him justice.
12. Where one, voluntarily, with the leave of court, and the consent of a plaintiff in execution, substitutes himself in the place of another, as a claimant in a proceeding to try the right of property—he cannot afterwards be allowed to object, that all this was irregular.
13. In order to comply with the law, authorising executions to be forwarded to other counties, (Aik. Dig. 170,) the sheriff must deposit a copy of the execution in the clerk's office, of the county to which it is sent, and must endorse on it, a copy of the return made by him to the original—and unless this is done, the copy would not, *in itself*, be evidence on a trial of the right of property, in the goods levied on.
14. But the act is merely affirmative, and does not exclude every other mode of proving a copy of the execution. An examined, or sworn copy, is admissible.
15. *Aliter*, where the issue is *nil tuel record*, in which case, the record must be produced, *sub pede sigilli*, or otherwise made authentic, in itself.
16. In a trial of the right of property, the plaintiff in execution need not produce the judgment, on which the execution issued—nor can the claimant be allowed to litigate its regularity or justice; or show that the defendant in execution was dead when it issued.

Error to the Circuit court of Mobile.

Trial of the right of property, before *Pickens, J.*

On the twenty-sixth day of May, A. D. eighteen hundred and thirty-two, the clerk of the Circuit court of Monroe, issued a *pluries* writ of *feri facias*, directed to the sheriff of Mobile county, requiring him to make of the goods and chattels, lands and tenements of William H. Howell, an amount in damages and costs, said to have been adjudged to the defendant in error by the Circuit court of Monroe, which *feri facias* was levied on the twenty-fifth of August, eighteen hundred and thirty-two, on certain negro slaves, as the property of the defendant therein; and on the twenty-ninth of September thereafter, they were claimed by James Wilkins, to be the property of Caleb Howell, deceased. On the last mentioned day, James Wilkins entered into bond with surety; conditioned that the claimant, as administrator of the estate of Caleb Howell, should have the slaves claimed by him forthcoming, to satisfy the execution, in the event of their liability to the same. And further, to "pay such costs and damages as may be recovered against him, for putting in such claim for delay."

In the record, and immediately after the foregoing was found, a bond, executed by William J. Bettis, and two other persons, as his sureties, on the twenty-seventh of November, A. D. eighteen hundred and thirty-four, reciting the levy in eighteen hundred and thirty-two, on the negroes claimed by James Wilkins, and conditioned that William J. Bettis, administrator of Caleb Howell, deceased, shall have the slaves forthcoming, to satisfy the execution of the defendant in error, in the event of its being determined, that they are liable to its satisfaction, "and also such costs and damages as may be recovered against him," (claimant.)

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Immediately following the above, was another bond, executed by William J. Bettis, and three other persons, as his sureties, on the sixth day of November, A. D. eighteen hundred and thirty-five, reciting, as before, the levy in eighteen hundred and thirty-two, on the negroes claimed by James Wilkins, and conditioned that William J. Bettis, administrator of Caleb Howell, deceased, should have the slaves forthcoming, to satisfy the execution of the defendant in error, in the event of its being determined that they were liable to its satisfaction, "and shall pay such costs and damages, as may be recovered against him (claimant) as aforesaid, for putting in such claim for delay."

An issue was formed as follows: "The State of Alabama, Mobile county, Circuit court, Fall term, eighteen hundred and thirty-four: Henry W. Taylor, plaintiff in execution, vs. James Wilkins, claimant. The plaintiff in execution avers, that the slaves Delsey, and her child, Lydia, and Stephen, are the property of William H. Howell, the defendant in execution, and are subject to the execution of the said plaintiff." Signed by plaintiff's attorneys.

"And the said William J. Bettis, administrator of Caleb Howell, comes and saith that the said negroes were not subject to the satisfaction of said execution, and prays the same may be enquired of by the court," &c. Signed by attorneys for claimant.

At the term of the Circuit court of Mobile, on the first Monday after the fourth Monday of October, A. D. eighteen hundred and thirty-five, the following order was made: "in this case, came the parties, by their attorneys,

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and it appearing to the satisfaction of the court, that at a previous term of this court, to wit, at the Fall term, eighteen hundred and thirty-four, thereof, William J. Bettis was admitted as administrator of said estate of Caleb Howell, deceased, defendant, to defend said suit—which order of the court was failed to be entered. It is ordered by the court, that said order be entered now as of said term; and thereupon came the said William J. Bettis, and filed his bond, which being objected to by the plaintiff, is ordered by the court now here to be filed; and for sufficient reasons appearing to the court, from the affidavit of the claimant, it is ordered, that this cause be continued.”

And the cause being continued until the first Monday after the fourth Monday in October, A. D. eighteen hundred and thirty-six,—at a term of the Circuit court of Mobile county, then holden, was submitted to a jury, upon the issue joined, who, by their verdict, found the slaves in question subject to the plaintiff's execution, and ascertained the value of each; and further found “ten *per cent* damages, on the amount of the execution, amounting to one hundred and seventy-eight dollars, and eighteen cents.”

The record then, after an entry of judgment, in the usual form, as it respected the slaves, proceeded: “and the said plaintiff recover of the said defendant, the sum of one hundred and seventy-eight 18-100 dollars, the damages aforesaid, assessed by the jury aforesaid, and his costs, in this behalf expended,” &c.

On the trial, the presiding judge, at the instance of the claimant, sealed a bill of exceptions; from which it

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appeared, that the plaintiff in execution offered in evidence a paper, purporting to be a copy of the execution levied on the property in controversy, though it was not certified to be a copy, and was objected to by the claimant.

The plaintiff in execution then introduced a witness, who stated that he levied the original execution, and had the same in his hands, when this claim was interposed: immediately thereafter, he made out the copy now offered, and filed it in the office of the clerk of the Circuit court of Mobile, and returned the original to the office of the clerk of the court, from which it issued. The witness further stated, that at the time of the levy related by him, he was a deputy sheriff, but that the term of office of his principal, had since expired. This evidence was objected to by the claimant, his objection overruled, and the copy read to the jury.

The plaintiff then proposed to read to the jury the execution, without producing the judgment on which it purported to have issued. To this the claimant objected, but his objection was overruled, and the execution read accordingly.

The plaintiff then read to the jury a transcript of the record of the suit on which the execution issued, which contained no judgment, but a mere *memoranda*, stating that there was a verdict for plaintiff for a sum certain, (expressing it,) followed by these words: "judgment for plaintiff;"--whereupon the claimant moved the court to instruct the jury, that "as it was shown by the record that there was no judgment rendered on the verdict in said cause, that they must find for the claimant." Which

instruction was refused by the court, who expressed the opinion, that it was immaterial to the issue, whether there was a judgment or not.

The claimant, on his part, moved that the defendant in execution was dead, at the time the execution issued, and thereupon moved the court to instruct the jury, that for that cause, the same was void, and that the jury, if satisfied of the fact of his death, must find for the claimant; which instruction the court also refused.

The claimant offered to prove further, that the judgment had been satisfied by the defendant in execution, but the court refused to admit such evidence, on the ground that it was not material to the issue, which merely litigated the fact, whether the property in controversy, as against the claimant, was liable to the debts of the defendant in execution.

Whereupon the claimant excepted to the opinion of the court, in the several points presented by the bill of exceptions; and, to revise the same, and other questions of law, arising upon the record, the plaintiff in error, as administrator of William J. Bettis, who has died since the rendition of judgment by the Circuit court, prosecuted his writ of error to this court.

The assignments of error were:

1. The court erred in rendering judgment against William J. Bettis, *de bonis propriis*, whereas he was but an administrator.

2. The court erred in rendering judgment for damages, against the said William J. Bettis, who was not responsible therefor.

3. The court erred in proceeding to trial, when the

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cause had been discontinued, as to the defendant, Wilkins.

4. The court, erred in the several decisions made, as shewn in the bill of exceptions, in receiving and rejecting evidence, in instructing the jury, and in refusing, as requested by the claimant.

5. That the court erred in the rendition of the judgment shewn in the record.

Stewart, for plaintiff in error.

Campbell, contra.

COLLIER, C. J.—The assignment of errors lead us to consider—

First—The regularity, in point of law, of the verdict and judgment against William J. Bettis, as rendered upon the trial of the right of property.

Second—Whether William J. Bettis, was legally a party to the proceeding in the Circuit court.

Third—The correctness of the several decisions of the judge of the Circuit court, pending the trial before the jury.

First—The plaintiff, in the first place, objects to the judgment of the Circuit court, because the jury find ten *per cent* damages on the amount of the execution, in favor of the defendant in error, without declaring by their verdict, that the claim of property was interposed "for purposes of vexation or delay." The section of the statute which confers the right to impose damages, in such a case, is as follows: "In all trials of the right of property, as aforesaid, when the jury may be of opinion

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that the claim was made to said property for purposes of vexation or delay, they shall have power to give such damages as the case may require, not exceeding fifteen *per cent* on the amount of the execution."

It is a clear rule, that a statute imposing a penalty, must be strictly construed, and closely followed in its application. The court cannot lessen or increase the penalty, and if the form of procedure,—the measure or description of proof, are prescribed,—they must be regarded, or the statute itself cannot be allowed to operate —(Broadwell vs. Conger, 1 Penning. R. 210 ; Fairbanks vs. Antrim, 2 N. Hamp. R. 105.) Now, the act no where requires that the jury, in giving damages, shall express, by their verdict, the causes which influenced them ; but it declares the *only* causes that could authorise such verdict, and, guided by reason, we are bound to suppose, that they did not usurp a right, but honestly entertained the opinion, that the claim to the property in controversy was made "for purposes of vexation or delay."

But it is insisted for the plaintiff, that the case of Logwood vs. the Huntsville Bank, (Ala. Rep. 23,) and the subsequent cases in this court recognising it, are authorities, to shew the judgment in the case at bar to be erroneous. The case mentioned, was a proceeding by notice and motion, under the charter creating the bank ; and the court only decide, that a party, pursuing a summary remedy given by statute, must conform strictly to the terms of the act, and the conformity must be shown by the record. That case, it may be remarked, was a judgment by default : had it been submitted to the jury on an issue, several facts, supposed to be essential, would

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either have been intended to exist, or else have been considered as waived, and the record then need only have shown such a compliance with the statute, as was necessary to give the court jurisdiction. The dissimilarity of the two cases is strikingly apparent;—in that cited, the record did not discover that the court had jurisdiction of the proceeding—in the case at bar, the right of the court to hear and determine the case, was undeniable. Again: the one is a case *stricti juris*, while the other is governed by more liberal rules.

We have shown that penal statutes are subject to a strict construction, yet the application of the rule will not sustain the objection. On trials at the Circuit, the judge informs the jury, that if, in their opinion, the claim of property was made for purposes of vexation or delay, they are authorised to give such damages as they may think proper, not exceeding fifteen *per cent* on the amount of the execution. When the jury return to the court their verdict, by which they assess damages, not exceeding the *maximum* authorised, they declare what, in their opinion, is the appropriate measure. More than this surely cannot be necessary, in order to legalise their action.

In *Rountree vs. Smith*, (1 Stew. R. 157,) it was held, in an action against a sheriff for the escape of a debtor, that the jury should expressly find, that such debtor or prisoner did escape with the consent, or through the negligence of the sheriff, or that such prisoner might have been re-taken, and the sheriff and his officers neglected to make immediate pursuit. This case, however, bears no analogy to the one at bar, for the statute, in *totidem verbis*, requires such to be the *expressed* finding of the jury.

It is further objected, that the judgment is irregular, in being rendered against William J. Bettis, in his individual capacity, for damages and costs, instead of directing the amount to be levied *de bonis intestatis*. Our statutes no where, in express terms, authorise the claim of property levied on, to be made by an executor or administrator, so that the question of the personal liability of the claimant, must be determined by a reference to the fitness of the thing, and the analogies of the law. It cannot be denied, even if an administrator incurs a personal responsibility, according to the stipulations of his bond, that he may make good the issue on his part, by showing title in his intestate (*Mansell vs. Israel*, 3 Bibb's Rep. 510.)

To test the question by analogy, --suppose an administrator to detain, in that character, the possession of personal property, to which another person had a paramount title. The true owner is not forced to the necessity of asserting his right to the *thing* against him in his fiduciary character, but may charge him personally, upon the ground of his possession. And in this there is no hardship, for the administrator may retain possession, to enable him, if a recovery is had against him, to restore the property to its rightful owner.

In respect to the damages for a detention, in legal contemplation, the use of the thing would afford an adequate indemnification, and if the question of title was litigated in good faith, to protect the rights supposed to pertain to the intestate's estate, the administrator, though primarily liable, might look to that source for reimbursement.

If the law were otherwise, it would frequently operate

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injuriously to the true owner of property. Was the administrator only chargeable in his representative character, the estate of the intestate could alone be resorted to, and if the property was disposed of in the course of administration, before the determination of the suit against the administrator, so that it could not be reached, the owner would be referred to the estate of the intestate, and if that were insolvent, he would come in as other creditors. But the insolvency of the administrator, when charged in his own right, cannot work a loss to the owner, as the law authorises the delivery of property to the plaintiff, immediately on commencing his suit, upon his indemnifying, by bond and surety, the defendant; unless the defendant himself will execute a bond, with surety, to have the property forthcoming, to satisfy such recovery as may be had against him.

The rule, that he who has the possession of property, which he detains against the rightful owner, is liable to an action,—is so strict, that it has been holden, where there are several executors, and one only has the possession, he alone must be sued. (2 Starkie's Evi. 494; 1 Saund. on Pl. & Evi. 436.) And a defendant will not be allowed to give in evidence, in the action of *detinue*, (as he may in *trover*,) that the property was delivered to him as a pledge—(Starkie on Evi. 495; Bull. N. P. 51.) Nor will it avail him any thing, to show that the property was destroyed, or died after suit brought—(Skipper vs. Hargrove, Martin's No. C'a. Rep. 74; Carroll vs. Early, 4 Bibb's R. 270.)

Now, in the case at bar, the claimant received the possession of the slaves levied on, and stipulated to pay such

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costs and damages as might be recovered against him, so that the slaves may be had forthcoming to satisfy the execution, if they are living; and if they are dead, it is right that it should be satisfied out of his estate, as he wrested them from its operation. So far as it respects the damages, it cannot be material, even in an equitable point of view, whether he is indemnified to that extent: the jury, by their finding, have said that the claim of property was not made in *good faith*. The costs rest upon the same ground, and does not prove that the judgment is erroneous. If the administrator, in such a case, is aggrieved, by being forced to expend money to protect the estate of his intestate, the court that settles his accounts can do him justice.

Second—In regard to the second point, we think it cannot be seriously argued from the record, that the proceeding in the Circuit was discontinued by James Wilkins, or that William J. Bettis was not legally a party. Bettis voluntarily, by the assent of the court, and with the consent of the defendant in error, was substituted for Wilkins, and it is not for the plaintiff in error now to object, that all this was irregular—*consensus tollit errorem*.

Third.—The execution levied on, the property claimed, it may be repeated,—was from “another county,” so as to render its return there necessary. The statute, so far as applicable to such a state of case, is as follows: “Wherever property shall be levied on by virtue of an execution from another county, if the same shall be claimed, and bond given to try the right thereof, the trial shall be had, as heretofore, in the county where the levy

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shall have been made, and it shall be the duty of the sheriff to return the execution to the court from which it issued, with his return endorsed, and to make out a copy of the same, and of his return, and return such copy to the Circuit court of the county in which the levy shall be made, and the copy of such execution, shall be sufficient for the court to proceed on, and try the right of the property levied on." In order to a compliance with this law, it is not only necessary for the sheriff to deposit a copy of the execution in the clerk's office of the court to which the papers pertaining to the trial of the right of property are returnable, but he must also endorse a copy of the return made by him to the original: unless this be done, the copy made by the sheriff will not be evidence *in itself*.

The act, however, it may be observed, is merely affirmative, and does not necessarily exclude every other mode of proving a copy of the execution, so that the question arises, whether the proof made, as shown by the bill of exceptions, was sufficient for that purpose. The deputy sheriff, who levied the execution, states that the paper offered as a copy, was made by himself, and that he regularly returned the original to its proper depository. It was, then, an examined or sworn copy, and according to all authority, is admissible on an issue to the jury. The law is otherwise, where the issue is *nul tiel record*: there, the record must be produced *sub pede sigilli*, or otherwise made authentic within itself, and if it be of the same court, it has been sometimes (though not uniformly) held, that the *record itself* must be inspected — (2 Bacon's Ab. 612; Burk's ex'ors vs. Treggs' ex'ors, 2

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Wash. R. 215; 2 Saund. on Pl. & Ev. 755, 756; 1 Stark. Ev. 155, 156, 157; Geohegan vs. Eckles, 4 Bibb's R. 5.)

The remaining questions arising on the bill of exceptions, are believed to have been settled by the decisions of this court.

In Carlton et al. vs. King, (1 Stew. & Por. R. 472,) it was decided, that on the trial of the right of property, it did not devolve upon the plaintiff in execution, to produce the judgment on which the execution issued.

The case of Hooper vs. Pair, (3 Porter's R. 401,) was a trial of the right of property; and the court say, that the statute regulating the proceeding, directs that the issue shall be so formed as to try the right of property; and it was framed in such terms as to present the question, whether the property, at the time of the levy, was subject to the satisfaction of the execution; that the statute did not authorise an issue, which would allow the claimant to litigate the regularity or justice of the judgment of the plaintiff in execution.

In Collingsworth vs. Horn, (4 Stew. & Por. R. 237,) the claimant objected to a *pluries* execution, on the ground that the defendant therein, was dead at the time of its issuance. The court held, that the objection was not available for one who was a stranger to the execution, and that being preceded by an *original* and *alias*, was not absolutely void.

The case of Perkins and Elliott vs. Mayfield, (5 Porter's R. 182,) following what was supposed to be the settled law of this court, decided that the claimant could not be allowed to insist, that the judgment was too defective to authorise an execution to issue. And in Boren et al. vs.

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McGehee, (6 Porter's R. 432,) it was determined, that a defendant in execution could not object against a *bona fide* purchaser, at a sale made under it, that the judgment was satisfied before the sale, though the satisfaction did not appear of record.

These cases are deemed decisive of the present, and it only remains to say, the judgment is affirmed.

WILLIAMS & IVEY, EX'ORS, vs. SIMS et al.

1. Several joint executors were, at common law, considered as but one person.
2. At common law, all the executors named in a will, were required to join in prosecuting suits, and in actions against executors, *might* be made defendants—but in the last case, all who proved the will were required to be joined.
3. [The non-amenability of a co-executor to the jurisdiction of an English court, affords no legal excuse for the omission to join him as a party defendant, if he be living, and has taken upon himself to execute the will.]
4. [In England, service of a writ may be perfected on an absent co-defendant, by process of outlawry.]
5. [But the American cases do not support the English rule.]
6. The statutes of this State, relating to joint obligors, do not embrace joint-executors; and are defective, in not providing a mode of proceeding, where a co-executor resides without the State.
7. The non-residence of a co-executor, is sufficient to relieve the plaintiff from the necessity of joining him in an action with his co-executors.

Error to Pickens Circuit court.

Assumpsit against executors, tried by *Martin*, J.

The defendants in error sued the plaintiffs, as the executors of Thomas Ivey, deceased, in the Circuit court of Pickens, on a promissory note, made by their testator and another.

The plaintiffs in error pleaded in abatement, that James Cavat, together with them, were appointed by their testator, executors of his last will and testament; and that afterwards, on the thirty-first day of October, eighteen hundred and thirty-six, the plaintiffs, and Cavat, who is still living, duly proved their testator's will, and took upon themselves the burthen of its administration. And fully to prove that they, with Cavat, are joint-executors, the plaintiffs, in their plea, made *profert* of the letters testamentary, &c.

The defendants in error replied, that James Cavat, who was alleged in the plea to be a co-executor with the plaintiffs, was, at the commencement of the action, and still continued to be, a resident of the State of Mississippi, without the jurisdiction of the court, &c. To this replication there was a demurrer, which being overruled, and plaintiffs in error declining to join issue, a judgment was rendered against them for the amount of the note, with interest.

Phelan, for plaintiff in error.

Porter, contra.

Phelan, for plaintiff in error, insisted that the non-joinder of Cavat was pleadable in abatement—(1 Chitty's

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Pl. 41, 42; *ibid.* 392; 6 Term Rep. 327; Toller, 471; Gould's Pl. ch. 4, sec. 73; 2 Nott & McCord, 70; 1 Haywood, 216.)

The replication to the plea was bad;—it did not admit or deny the plea, (1 Chitty's Pl. 541,) nor conclude with a verification, though introducing new matter—(1 Chit. 541; Gould, 168.) The non-residence of a co-executor is not matter in avoidance. All co-executors are but one person in law, (Toller, 37,) and must be sued, and the action cannot be discontinued, as to those not served until after *alias* and *pluries*—(Minor's R. 77.) Where non-joinder is pleaded, plaintiff must commence fresh action—(1 Chitty's Pl. 402.)

COLLIER, C. J.—The questions for our decision, are presented by the pleadings, and are—

1. Was it incumbent on the defendants in error, to join all who had qualified as executors? or,

2. Did the non-residence of Cavat relieve them from the necessity of joining him as a party to the action, with his co-executors?

1. If a man appoint several persons his executors, and dies, at common law, they were esteemed as but one person, in representing the testator—(Wheeler et al. vs. Wheeler, 9 Cow. R. 34;) and where there were several executors named in the will, all must have joined in the prosecution of an action, as the representatives of their testator—(2 Williams on Ex'ors, 1147.) Thus, in *Bodle vs. Hulse*, (5 Wend. R. 313,) it was held, that an action at the suit of one styling himself *an acting executor*, could not be maintained, as it appeared there were others,

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though they did not act. In such a case, the court say, the correct practice, where one renounces the executorship, is to prosecute the action in the name of all the executors named in the will, if living, and on summons to those who will not join, there will be judgment of severance, and then those who have taken upon themselves to act, may proceed in their own names—(Wentw. Off. Ex. 212; 14 edition, 212, 225; 2 Williams on Ex. 1188, note s.) The law, in this respect, has been modified by the operation of our statutes, in regard to the qualification of executors.

The precise question came before this court, in Cleveland et al. ex'ors, vs. Chandler, (3 Stew. Rep. 489.) The court say, that "at common law, the executor derived the authority to administer the testator's estate, from the will exclusively; probate was required, that its genuineness might be ascertained, and its registration was intended as evidence to the world of who was executor. It would therefore follow, that as all persons named as executors in the will derived a joint interest, they should join in the prosecution of actions in regard to the estate."

The court then briefly considers our statutes in regard to the probate of wills, &c., and conclude: "From thence it is obvious, that executors here derive not their authority entirely from the will; and that they are not entitled to exercise any power as such, until they have given bond, and taken the oath prescribed."

Thus, we discover that several joint executors, are to be considered as but one person in law. At common law, all who were appointed by the will, were considered as executors, for the purpose of prosecuting suits,

while under the influence of our statutes, those alone are esteemed as such, who are qualified according to the requirements.

According to the English common law, it is regarded as settled, that in actions against executors, all who are named as such in the will, whether they have proved or not, may be made defendants—but if they have proved the will, they must be joined—(Lev. Rep. 161; 2 Saund. P. & E. 505.) The plea of the plaintiffs in error, strictly conforms to the authorities and course of practice prevailing in *England*; it contains the two allegations deemed essential *there*, viz., that the co-executor not sued, *has administered, and is still alive*—(2 Williams on Ex. 1188, 1189.) This brings us to consider the remaining question.

2. Now, it will follow, from what we have said, that the non-amenability of a co-executor to the jurisdiction of an English court, affords no legal excuse for the omission to join him as a party defendant to an action; if he be living, and has taken upon himself to execute the will. There, the law authorises the plaintiff, (though he may be unable to effect the personal service of a writ, by means of what is there called *process of outlawry*,) to prosecute his suit to judgment. Our laws, in this respect, (as it regards executors and administrators,) are defective, in not providing a mode of proceeding, where a co-executor resides without the State, since it is clear, that our statutes relating to joint obligors, &c. do not embrace joint-executors, who conjointly represent the interests committed to them by the will. And the question now presented for our consideration is, Does the American

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decisions sustain the English rule, and should we not, in view of the deficiency of our laws, be inclined to depart from it.

A most industrious examination has enabled us to find two, and but two, cases, in which the point came directly in judgment. The first is the case of *Tappan vs. Bruen*, (5 Mass. R. 195,) in which Mr. Chief Justice Parsons remarked, it had been the immemorial practice, in the service of a writ sued on contract, against two or more defendants, if some of the defendants are without the jurisdiction of the commonwealth, so that they could not be arrested, or have no place of abode within the same, at which a summons might be left to cause the writ to be served on the defendants within the State, and to proceed only against them for the breach of the contract by all the defendants; and if the plaintiff recover judgment, it is entered against the defendants only who were served with process. This practice has been found convenient; and no injustice is done, because, if judgment had been recovered against all the joint debtors, the plaintiff might have satisfied it out of the defendants against whom it is in fact recovered. The practice had its origin in necessity, as the law of Massachusetts provided no mode of service upon a debtor without the State, who has no place of abode or property within it. And the court say further, that it has been extended to actions against executors or administrators living in different States, as the judgment is against the estate of the deceased.

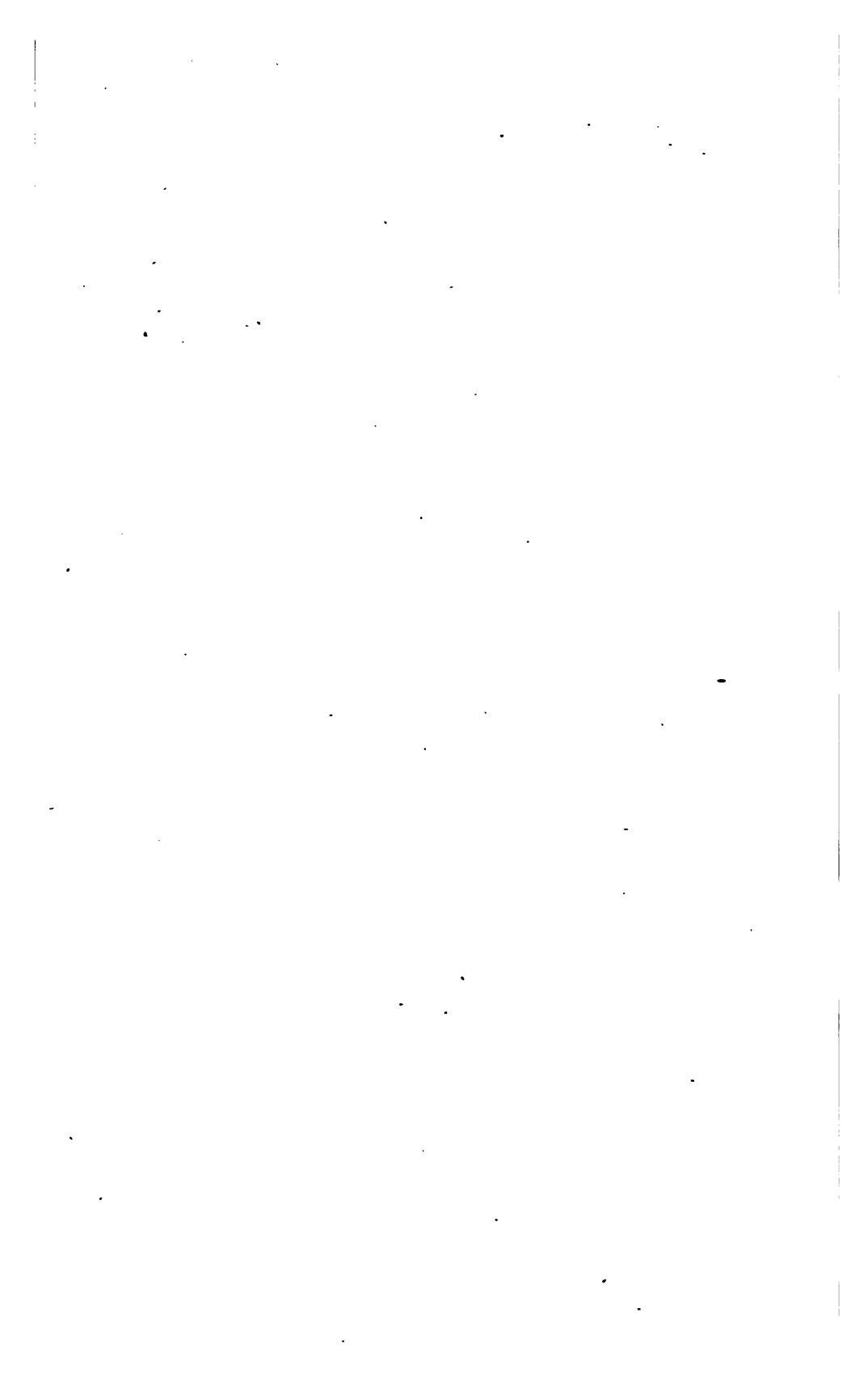
The other case is *Beach vs. Baldwin*, (9 Conn. R. 437.) In this case, the defendant pleaded, that the testator ap-

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pointed three other persons, together with the plaintiff, his executors, who proved the will and accepted the trust; and are still living. The court held, that the plea was not good, because it did not show *where the co-executors resided*; and because it did not allege that they were such, at the time when the suit was commenced. The court remarked further, that the jurisdiction of the courts in Connecticut, depends on the residence of the parties: the principle of the common law in that State, therefore, was, that this fact must be shown in the plea, however the forms might be. If the non-residence of an executor should excuse the omission to join him as a plaintiff, much more should it dispense with the necessity of making him a co-defendant. The cases cited, we think, furnish ample authority for us to sustain the judgment of the Circuit court.

The fact, that process issued against but two of the executors, can make no difference. There is no authority for discontinuing as to the executor not served, which would not warrant the omission to proceed against him in the first instance. In fact, such a distinction would not harmonise with the analogies of our statutory regulations, in respect to suits against joint obligors, &c.

In every view in which this case has presented itself to us, we think the rule, as modified in Massachusetts and Connecticut, far better calculated to promote the ends of justice, than the rule which prevails in England; and hence, we are disposed to depart from the latter, and recognise the former. The consequence is, that the judgment of the Circuit court is affirmed.



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18. But a mere valuation promise to accept a bill of exchange, not yet drawn, is not a negotiation, as will, in law, bind the acceptor, even if made to the person in whose favor the bill is drawn.—*ib.*..... 263
19. A declaration against discharge, a drawer of a bill, which does not amount to an offer of payment, and notice of refusal, is not a discharge, and is in error.—*Smith & March vs. P. M.*..... 503
20. Where one draws a bill on himself, and accepts it, and is afterwards sued thereon, and does not offer payment—he will be liable, without notice of nonpayment, as it was his duty to provide for the payment of the bill,—and he must have had knowledge that it was unpaid.—*ib.*..... 503
21. Where a judgment is entered up for more than the amount due, a motion by a defendant for a new trial, will be refused, on condition that plaintiff remit the excess.—*ib.*..... 503
22. And, in such a case, if the error is no exception for more than the amount due on the judgment, the remedy is to supersede the execution.—*ib.*..... 503
23. Inland bills of exchange, in this State, are regulated and governed by the same laws, usages and customs, which regulate and govern the foreign bills of exchange, except in the amount of damages.—*Bank of the Farmers' Bank of Chateaufort.*..... 539
24. Damages, other than interest, are never given by the law merchant, against an acceptor of a bill—as acceptor merely.—*ib.*..... 539

25. In England the damages are estimated at the difference of exchange, and the expenses of forwarding.--*ib.*..... 539
26. Where the common money counts are added to a count on a bill of exchange--the clerk may compute the damages without entering a *note prosequi* to the common counts.--*ib.*..... 539
27. The decision (Minor 18,) founded on the English decisions, overruled.--*ib.*..... 539

BLANK.

1. Where one signs his name to a blank piece of paper, with intent that it shall be filled up, as a note or endorsement, he is liable on the same, although the person intrusted with it, shall violate the confidence reposed in him, by filling it up with another name, or using it for another purpose, than the one intended.--*Roberts vs. Adams.*... 297
2. Such a blank, is a letter of credit to any amount which the person to whom the same is committed, may choose to insert in it.--*ib.*..... 297
3. And if such a blank be obtained by a firm, when in existence, and be filled up by one of the partners after its dissolution, such partner will be liable to reimburse the moneys paid by the signer or endorser in blank, to the holder.--*ib.*..... 297
4. Where one lends his name on an instrument in blank, to partners, as their security, and by the negligence of one partner, and the fraud of the other, the lender is compelled to pay the sum inserted in the blank instrument--he is entitled to reimbursement from either of the partners.--*ib.*..... 297
5. *It seems*, however, that if a blank be entrusted to one, for the purpose of inserting a limited sum in it, or be used for a particular purpose, and it be filled up with a larger sum, or used for a different purpose, than that contemplated by the signer or endorser of the blank, and the facts be traced to the knowledge of plaintiff, at the time he acquires possession of the instrument, it will prevent a recovery.--*ib.*..... 297

CHANCERY.

1. Where one was employed as clerk or agent to take charge of a mercantile establishment of complainant, who, at sundry times, furnished invoices of goods, and refused to render an account of sales or of moneys received--the jurisdiction of chancery is undoubted. -- *Halsted vs. Rabb.*..... 63

2. In agencies, including only a single transaction, such as a consignment of goods, or the delivery of money, to be laid out in the purchase of a particular thing, or to be paid over to a third person,—a suit at law is maintainable, and if a discovery were not desired, such a case would probably be only cognizable at law.—*ib.*..... 63
3. It is a well settled rule of chancery, not to decree on a case supported by proof, and not sustained by the allegations of the pleadings. The allegation and proof must correspond.—*Maury's adm'r vs. Mason's adm'r.*..... 211
4. There is a broad and clearly defined distinction between trusts of property, which are specific in their nature, and trusts of money, which have no ear-marks, by which they can be identified.—*ib.*..... 211
5. But there is no difference between a trust created by the deposit of money in the first instance, and one where the money is raised by the sale or conversion of a chattel deposited with a trustee, to convert into money.—*ib.*..... 211
6. Whenever the subject matter of a trust can be sued for at law, the statute of limitations may be insisted on as a bar, although the remedy is pursued in a court of equity.—*ib.*..... 211
7. The only trusts not within the operation of the statute, are those which are peculiarly and exclusively, the subjects of equity jurisdiction.—*ib.*..... 211
8. A subsisting recognised and acknowledged trust, as between the trustee and the *cestui que trust*, is not barred by the statute of limitation.—*ib.*..... 211
9. If specific property is placed in the possession of any one, in trust for a specific purpose, as long as it remains in specie, and capable of identification, it is considered as held subject to the trust; until such time as the trustee shall do some act evincing his intention to convert it to his own use, or to renounce or abandon the trust confided to him; and in all such cases, between the trustee and *cestui que trust*, such intention must be known or communicated to the trustee, otherwise the property will be considered as remaining subject to the trust.—*ib.*.... 211
10. But this rule has never been applied to mere money trusts, when the fund has not been kept distinct and separate from other funds belonging to the trustee.—*ib.*.... 211
11. It is now well settled, that if a defendant, by plea or answer, relies on the statute of limitations, as a defence—the plaintiff, if he wishes to bring his case within any of its exceptions, must amend his bill or file a special repli-

- cation, so that the new matter introduced by him may be controverted or avoided by the opposing party.—*ib.*..... 212
12. And the act of eighteen hundred and twenty-three, dispenses only with the merely formal replication, before necessary, and does not authorise the introduction of evidence, not applicable to any previously made allegation. *ib.*..... 212
13. The same strictness in an answer to a bill in equity, where the statute of limitations is relied on as a defence, is not requisite, as in a plea.—*ib.*..... 213
14. Where a defendant in equity wishes to bring the case charged in complainant's bill, by evidence, to be one of open account, he must make the necessary allegations of facts, by his plea and answer.—*ib.*..... 213
15. The mere statement of an account before auditors, for the purpose of facilitating the examination of matters before them, is not a revival of a demand barred by statute. *ib.*..... 213
16. A bill will not be dismissed, without prejudice, to enable a witness in a future suit, to tender a suitable release to restore his competency.—*ib.*..... 213
17. A transfer of a chose in action for a valuable consideration, vests such an interest in the transferee, as a court of equity will enforce, and a court of law protect, if the assignee sue in the name of the assignor.—*Goodwyn vs. Lloyd.*..... 237
18. The representative of one who, at an administrator's sale, purchased, for an inadequate price, slaves, assumed to be subject to a mortgage which had lost its lien, is a necessary party to a bill filed by the mortgagee, seeking to foreclose the mortgage, to protect the interest of creditors; and without making such representative a party, no decree can be had in the cause.—*Singleton vs. Gayle.*.... 270
19. An executor who has one of the slaves in possession, should also be made a party to the bill.—*ib.*..... 270
20. Where a complainant neglects or refuses to make the necessary parties defendants to his bill, after objection made—the court will be authorised to dismiss the bill without prejudice.—*ib.*..... 270
21. A bill to foreclose a mortgage, where the record contains no proof of the execution of the bond and mortgage, will be dismissed.—*ib.*..... 270
22. A record in chancery must shew affirmatively all the evidence necessary to sustain it.—*ib.*..... 270
23. Where the language of the master's report is such as to

- warrant the belief that the bond and mortgage had been produced before him and proved, it will be sufficient; but where the report does not warrant such a belief—the production and proof before him of the bond and mortgage will not be presumed.—*ib.*..... 270
24. The report of a master before a decree of reversal, and on which report the decree is in some measure founded, cannot be afterwards considered.—*ib.*..... 270
25. The statute making an instrument of writing evidence of the debt or duty for which it was given, does not apply to suits in chancery.—*ib.*..... 270
26. Before a decree is pronounced, on a bill taken *pro confesso*, the court must be satisfied by sufficient evidence, of the justice of complainant's demand.—*ib.*..... 270
27. The answer of one defendant in chancery, cannot be read as evidence to charge a co-defendant.—*ib.*..... 271
28. Notice of the existence of a lien, admitted by one who purchased at an administrator's sale, under the lien, cannot bind those who claim under the purchaser.—*ib.*.... 271
29. Nor does such notice admitted, supersede the necessity of proving the lien, when it is attempted to be enforced.—*ib.* 271
30. A decree cannot be rendered against defendants, as executors *de son tort*, who are not sued in that character.—*ib.* 271
31. Where one is charged, as administrator of an estate, a decree cannot be rendered against him as a purchaser, with notice of a lien in favor of a complainant, seeking to enforce the lien.—*ib.*..... 271
32. No decree can be had against a purchaser without notice of a lien, unless his vendor, who was a purchaser with notice be made a party.—*ib.*..... 271
33. A defendant, who does not regard the mandate of the subpœna, is understood to have set at defiance the authority of the law, and to place himself in contempt of the process of the court, and is subject to attachment.—*Mussina vs. Bartlett*..... 277
34. As a general rule, a defendant who is in contempt, cannot be heard before the court, and is not allowed to contradict the allegations of the bill, or bring forward any defence, or allege any new fact.—*ib.*..... 277
35. Nor is he allowed to appear and contest the complainant's demand, before the clerk and master to whom the bill was referred to take an account—but the inhibition can be removed at any time by filing a full and complete answer.—*ib.*..... 277
36. Where a defendant, served with a *subpœna* in chancery, neglects to appear, so that the bill is taken *pro confes-*

- so against him, and referred to the clerk and master to take and report an account, it is not necessary that it should appear from the report made under the reference, that the defendant had notice of the time and place of taking the account.—*ib.* 277
37. A mortgage is regarded in equity, as a security for the debt, and when it becomes forfeited, the mortgagee may take proceedings to make the security available, if so authorised by the terms of the mortgage.—*ib.* 277
38. Where a party executes a mortgage for the security of several sums of money, to fall due at different times,—upon default in the payment of the debt which first falls due, the mortgage, *pro tanto*, becomes forfeited; and the mortgagee may proceed for a foreclosure and sale of the mortgaged premises.—*ib.* 277
39. Though the mortgagor may stop proceedings by paying or tendering what is due upon the mortgage.—*ib.* 277
40. Where a party executes a mortgage for the security of several sums of money, payable to the same person, and to fall due at different times, if on default, in the payment of the first sum, the mortgagee file his bill to foreclose the mortgage, and pending the suit the other debts fall due, it is competent to take an account of all the debts intended to be secured, and to decree a sale for their payment. *ib.* 277
41. Where a bill for the foreclosure of a mortgage, and a sale of the mortgaged premises, has been pending, and the defendant served with *subpœna* for several terms, it is competent to refer the bill to a master, to take and report an account, to receive his report, and render a final decree in the case at the same term.—*ib.* 278
42. It is not necessary in a decree for the foreclosure of a mortgage and a sale of the mortgaged premises, to prescribe some future day, for the payment of what may be due upon the mortgage, before a foreclosure and sale.—*ib.* 278
43. The sheriff is competent to execute a decree for the sale of mortgaged premises, upon the foreclosure of the mortgagor's equity of redemption, and the decree need not require a return of the proceedings thereon to the court.—*ib.* 278
44. Where the execution of a trust creates a mere money demand upon the trustee for a sum certain, or which may be reduced to a certainty by a reference to something else, there is no principle of law which renders necessary a resort to equity.—*Hitchcock et al. vs. Lukens & son.* 333

45. The jurisdiction of the county court, in the adjustment of the estates of deceased persons, is limited---depending upon legislative grants in its favor: but where the county court is incompetent, the powers of chancery are adequate to the emergency.--*Laevens vs. Butler et ux.*..... 381
46. Where, after judgment and execution, one files his bill to enjoin the judgment, stating that he has off-sets---but alleging no surprise on the trial, or discovery of new facts---there is no basis on which the jurisdiction of chancery can rest,---and the bill will be dismissed.--*Hill vs. McNeill.*..... 432
47. Where one has off-sets to an action, which he cannot prove without the aid of plaintiff's testimony---he must exhibit his bill in chancery, calling for a discovery, previous to judgment; or else show a satisfactory excuse for neglecting it.--*ib.*..... 432
48. A bill, in nature of a bill for a new trial at law, is never entertained, where the party might have had the full benefit of a motion for that purpose at law.--*ib.*..... 432

CHOSE IN ACTION.

1. A chose in action, is any right to damages, whether arising from the commission of a tort, the omission of duty, or the breach of a contract.--*Megee vs. Toland.*..... 36
2. If a chattel be found, and not converted to the use of the finder; or, or if it be hired or loaned, or otherwise failed---it does not thereby become a chose in action; and if it belong to a woman who marries, her right immediately vests in the husband, at least so far, that if she dies it will survive to him.--*ib.*..... 36
3. A chose in action at common law is not assignable.--*Goodwyn vs. Lloyd.*..... 237
4. A transfer of a chose in action for a valuable consideration, vests such an interest in the transferee as a court of equity will enforce, and a court of law protect, if the assignee sue in the name of the assignor.--*ib.*..... 237
5. But where the possession of the property assigned, is held by another, adversely, and under a color of title, and the owner would be driven to an action to recover his possession---it is a mere chose in action and the transferee cannot maintain action in his own name.--*ib.*..... 237

CLERK OF COURT.

1. Independent of statutory enactments, money cannot be lawfully paid to the clerk of court, in vacation; or in

- any manner than as the officer of the court, in term time.
Curiz vs. Thomas..... 293
2. As, on plea pleaded, when the cause of action is admitted to a partial extent; in the case of tender; and when money is paid into court in satisfaction of a judgment.--*ib*..... 293
3. But, in these cases, the money is required to be brought before the court, and placed in the custody of the clerk, as the fiduciary of the court.--*ib*..... 293
4. The only case in which a clerk is authorised by statute, to receive moneys, is in satisfaction of a recognizance, entered into by defendants, who have allowed judgment to be passed against them at the first term, on petition and summons.--*ib*..... 293
5. The clerk of the circuit court has no authority to issue writs of error in any criminal case: such writs must originate from an application to the Supreme court.--*Bourne vs. The State*..... 458
6. The clerk of the court has no power to ascertain the damages, but on a writing ascertaining the plaintiff's demand.--*Hanrick vs. The Farmers' Bank of Chattanooga*..... 539
7. Where the common money counts are added to a count on a bill of exchange--the clerk may compute the damages without entering a *nolle prosequi* to the common counts.--*ib*..... 539

CONTEMPT.

1. A defendant who does not regard the mandate of the subpoena, is understood to have set at defiance the authority of the law, and to place himself in contempt of the process of the court, and is subject to attachment.--*Mussina vs. Bartlett*..... 277
2. As a general rule, a defendant who is in contempt, cannot be heard before the court, and is not allowed to contradict the allegations of the bill, or bring forward any defence, or allege any new fact.-- *ib*..... 277
3. Nor is he allowed to appear and contest the complainant's demand, before the clerk and master to whom the bill was referred to take an account - but the inhibition can be removed at any time, by filing a full and complete answer.--*ib*..... 277

CONTRACTS.

1. Personal contracts are to have the same obligation, force

- validity and interpretation in every country, which they have in the country where they are made, or are to be executed.—*Goodman vs. Munks*..... 84
2. But the courts of no country are bound to enforce or hold valid, any contract injurious to its own rights, or those of its citizens; or which offends public morals, or violates public faith.—*ib.*..... 48
3. Remedies for the enforcement of contracts, or to obtain compensation for a breach, are to be regulated and pursued according to the *lex fori*, and not the law of the place where they are made or are to be executed.—*ib.*..... 84
4. The nature, validity, construction and effect of contracts, are to be ascertained by the *lex loci contractus*, and that law is considered as much a part of the contract, as if it were expressly inserted in it.—*ib.*..... 84
5. The discharge of a contract, or a defence against it, in the place where it is made, is available every where.—*ib.*..... 84
6. The *legal* obligation of a contract is discharged, whenever the statute of limitations of the place where it was made, has run against it; and nothing remains, but a moral duty, which courts of judicature cannot coerce.—*ib.*.... 84
7. *It seems*, that if the *legal* right be gone, the contract is discharged, until it is re-affirmed, or in some manner recognised.—*ib.*..... 84
8. Prescription constituting a bar at the place of the contract, operates as a defence *extra territorium*.—*ib.*.... 84
9. A contract for the sale or hire of a slave, is governed as far as the nature of the subject will allow, by the same principles that govern other contracts of sale.—*Ricks, ad. vs. Dillahunty*..... 134
10. Cases of bailment and unwritten contracts, when the contract is *expressed*, and the duties defined, are not open contracts in the view of the statute of limitations, and therefore, actions founded on them are not barred in three years.—*Murry's adm'r vs. Mason's adm'r*..... 213
11. In general, if there be a special parol agreement for the performance of any duty, no action will lie, until the duty has been actually performed.—*Gazzam vs. Kirby*.. 253
12. And if the contract has been executed, the agreement to pay the money becomes absolute, and a recovery may be had upon the appropriate count for an *indebitatus assumpsit*—*ib.*..... 253
13. If a party undertake to do work by a fixed time, or in a particular manner, but fails to perform it within the time,

- or according to the manner agreed; he cannot recover on the special contract.—*ib.*..... 253
14. But, if the work done, was of value to the defendant, plaintiff may recover on a *quantum meruit*.—*ib.*..... 253
15. If the work be so illy executed, as to be of no benefit to the defendant, the plaintiff is not entitled to recover any thing; not even for materials furnished.—*ib.*..... 253
16. If the work performed is of less value to a defendant, when completed, after a stipulated time, than it would have been, had the contract been performed with punctuality,—it is competent for him to reduce the recovery by shewing the fact.—*ib.*..... 253
17. And, in such a case, the contract is good evidence to shew what estimate the parties originally placed on the work.—*ib.*..... 253
18. To authorise a party to recover upon a count in the declaration, alleging a special contract, it is necessary to shew a contract substantially as alleged.—*Hitchcock et al. vs. Lukens & Son.*..... 333
19. But it is competent for a plaintiff, where no special contract is proved, if he have a good cause of action, to recover either in a general *indebitatus assumpsit*, *quantum meruit*, or *quantum valebant*, as the proof may warrant.—*ib.*..... 333
20. Where one man has money in his hands, which *ex equo et bono* belongs to another, if there be no contract, modifying or controlling the general liability to pay, the person entitled to the money may recover in an action for *money had and received* to his use.—*ib.*..... 333
21. Nor is it necessary that there should have been any agreement between the parties, to entitle the plaintiff to maintain this action—for the law creates the privity and the promise.—*ib.*..... 333
22. If money be given to one person to deliver to a third, the right to the money is transferred to the latter, and he may maintain action.—*ib.*..... 333
23. Nor does the statute of frauds interpose a barrier to a recovery in such a case—as the undertaking is not to answer for the debt, default or miscarriage of another, but to pay the money of another *already received*, or *when received*, to a third person.—*ib.*..... 333
24. Where the execution of a trust creates a mere monied demand upon the trustee, for a sum certain, or which may be reduced to a certainty, by a reference to something else,

- there is no principle of law which renders necessary a resort to equity.—*ib.*..... 333
25. If a contract under seal be so executed, as not to authorise a party injured by its breach to sue upon it, he may bring *assumpsit*, and make the contract inducement, by his declaration, or give it in evidence, without noticing it in the pleadings.—*ib.*..... 333
26. A husband can only be charged by the contract or admission of his wife, in consequence of some authority actually given, or necessarily implied, from the circumstances under which she acts.—*Reichelt vs. Harrison.*..... 351
27. But the circumstances under which plaintiff's property went into possession of the intestate of a defendant administratrix, may be shown, in defence, by proving a request from defendant to plaintiff to that effect, in the lifetime of her husband.—*ib.*..... 351
28. A contract for the sale of negroes, which is *executory*, and which is intended to defraud creditors, does not pass the title: and an action brought on the contract, by the vendee, against the vendor, for the slaves, cannot be maintained.—*ib.*..... 351
29. What the law will not accord by suit, cannot be attained by fraud or force.—*ib.*..... 352
30. Therefore, whenever the title to property has once passed, by an executed contract, it cannot be re-vested, by recaption, or any other mode of acquiring possession.—*ib.* 352
31. In Massachusetts, a distinction is made between actual conveyances, and contracts sought to be enforced: the latter may be avoided—the former are binding.—*ib.*..... 352
32. But in New York and Ohio, conveyances void by statute, as against creditors and purchasers, are binding between the parties.—*ib.*..... 352
33. Where one rents land, for the purpose of making a crop, upon the condition that he is to give up possession in case the owner sells to a third person, before the crop is made; it is not competent for the tenant, in case a sale is made, to object, that the contract of sale is not evidenced by a deed conveying a perfect title.—*Bean vs. Fail* 491
34. In the construction of written contracts, the intention of the parties, as ascertained from the terms and the subject matter, determines the meaning.—*Evans vs. Sanders.* 497
35. And, in questions of doubt, the contract is to be construed most strongly against the party who stipulates the payment of a debt, or the performance of a duty.—*ib.*..... 497
36. Where the terms of a contract are susceptible of two

- significations, they must be understood in the sense most agreeable to the nature of the contract :—and where a clause is susceptible of different constructions, it must be taken in the sense that will give to it some operation, rather than that which will have none.—*ib.*..... 497
37. Where one promised by a written contract, to pay money on the first day of January, eighteen hundred and thirty-six, with interest *from* eighteen hundred and thirty-five ; it was held, that the intention of the contracting parties was, that interest was to be paid from the first day of January, eighteen hundred and thirty-five.—*ib.*..... 497

CONVERSION.

1. The wrongful taking or detention of a personal chattel, or other illegal assumption of ownership, or using or misusing of it, amount to a conversion.—*Gray vs. Croche-ron.*..... 191
2. So a temporary conversion will make a defendant liable; as, if one ride a horse, or control the services of another's slave, though he afterwards restore them to the true owner—the cause of action, which was once perfect, still remains, and the restoration will only go in mitigation of damages.—*ib.*..... 191
3. If a slave be lost, during the time he is employed by a defendant, without the owner's consent, defendant is liable in trover, to the full value of the slave.—*ib.*..... 191
4. But if the employment be at an end when the slave is lost, defendant will only be liable for the temporary conversion, and the measure of damages, instead of being the value of the slave, will be the injury resulting to the plaintiff, from the employment, which, under some circumstances, may possibly be increased.—*ib.*..... 191

CORPORATION.

1. A corporation can do an act *in pais*, by an attorney in fact ; and so, an attorney, acting on behalf of a bank, may give the notice to a bank debtor, required by statute, previous to a motion for judgment.—*Curry vs. The Bank of Mobile.*..... 361
2. And such notice need not be under the seal of the corporation.—*ib.*..... 362
3. The ancient rule applied to corporations existing by the common law, that they could only act by their common seal, has no application to corporations created by statute.
ib...... 362

4. Corporations allowed to sue and be sued, necessarily possess authority to perform by their agents, services incident to the commencement or prosecution of suits.—*The Planters' and Merchants' Bank vs. Andrews*..... 404
5. The term *person*, in a statute, embraces not only *natural*, but *artificial* persons, unless the language indicates that it was employed in a more limited sense—therefore, a corporation is a person, within the meaning of the attachment laws—*ib.*..... 404

COURT.

1. Every court of justice, of necessity, has the power, whilst the papers of a cause are *in fieri*, to supply a loss occasioned either by accident or design.—*Dozier vs. Joyce*.. 303
2. All courts in the United States take judicial notice, that tribunals are established in the several states, for the adjudication of controversies, and the ascertainment of rights.—*ib.*..... 303
3. The conduct of a cause in court, is entrusted to the discretion of the presiding judge, and he may, when necessary, permit a party to introduce evidence, after the testimony is closed.—*James vs. Tait et al.*..... 476

COURT, COUNTY.

1. The jurisdiction of the county court, in the adjustment of the estates of deceased persons, is limited—depending upon legislative grants in its favor: but where the county court is incompetent, the powers of chancery are adequate to the emergency.—*Leavens vs. Butler et ux.*.... 381
2. The county court cannot decree distribution of an estate against an executor, where, by so doing, the testator's intention would be defeated.—*ib.*..... 381
3. The county court has no jurisdiction over the lands of a testator, without the limits of this state.—*ib.*..... 382
4. The statute, (Aik. Dig. 155,) delegates power to the judge of the county court, where the parties cannot agree, to ascertain, by testimony, the value of property brought into hotchpot, as a judicial officer; or to cause a jury to be impaneled for that purpose. It is error, therefore, for commissioners to make the valuation, or for the court to confer authority to that effect.—*Teat vs. Lee, adm'r.*..... 507
5. The law no where authorises the rendition of decrees, and the award of execution thereon, against distributees, for balances against them on distribution.—*ib.*..... 507

6. An appeal or writ of error does not lie from an interlocutory order of the county court.—*Merrill vs. Jones*. . . . 554
7. A judgment of the circuit court, on a writ of error, to revise an *interlocutory* order of the county court, though obtained with the consent of parties, will be set aside.—*ib.*. 554
8. And where the proceedings in the circuit court, might operate as a bar to a review of the same matters, when properly presented, after *final* judgment below—the proceedings will be set aside, and the writ of error dismissed.—*ib.*. 554
9. When an order of the orphans' court is made, requiring a defendant to appear in court, enter into bond, and take the necessary oaths, as administrator; and in an order of publication, eighteen months afterwards, he is recognised as administrator: it will be intended that he complied with the previous requisitions, and took upon himself the administration.—*Hosey, adm'r vs. Brasher*. 559

COURT, SUPREME.

1. There is no rule which allows this court to dispense with the examination of a case, because the amount involved is small.—*Patterson et al. vs. Cook*. 66
2. An appellate court can only learn from the record, what the verdict below was; and the entry of what may be the true finding, cannot control or diminish the force of that which is stated in the record.—*ib.*. 66
3. Verdicts informally returned may be corrected at the time, at the instance of the party injured, or if returned in consequence of instructions of the court, a bill of exceptions may be entered, and the decision thus examined.—*ib.*. . . 66
4. Where a point reserved for the determination of the Supreme court, will, with equal propriety, admit of a construction which will support or defeat the judgment of the court below—the former will be adopted as the true construction. The party wishing to avail himself of an alleged error in the judgment of an inferior court, must reserve the point, and present it on the record with reasonable certainty.—*Dozier vs. Joyce*. 303

COURT, TIME OF HOLDING.

1. The time of holding court is ascertained by law: and writs must be taken to be returnable to the next ensuing court, if issued more than five days previous to the term. *Jordan vs. Bell*. 53

2. If judgment be rendered at a term to which the writ could not, legally, be returned, such judgment may be corrected on error--if the defect is not waived.--*ib.*..... 53
3. But on returning a writ to the wrong term, or where the day is mistaken, the objection must be taken by plea in abatement.--*ib.* 53
4. Statutes, appointing the times for courts to be holden, are public acts, and will be judicially taken notice of.--*Administrators of Weatherford vs. Weatherford.*..... 171
5. Where the legislature passed a statute on the twenty-second December, eighteen hundred and thirty-six, requiring the courts of a particular circuit to be holden at a particular time; and on the twenty-third December, eighteen hundred and thirty six, enacted a statute upon the same subject, providing that the act should not take effect until the first day of August after its passage: it was held--
 - 1st. That the passage of the last statute did not repeal that of twenty-second December.
 - 2d. That, though one of the courts of the circuit was not provided for, in the act of the 22d December, yet the omission could not influence, as the court so omitted, should be holden at the time appointed by the pre-existing law, though it should conflict with some other court in the circuit: in which event, the judge appointed to the circuit, should call to his aid another judge.--*ib.*..... 171
6. Where the place of holding court is left blank in a writ, and the defect is in no way cured by appearance or otherwise—judgment cannot be rendered for plaintiff.--*Wragg vs. The Branch Bank of Alabama at Mobile.* 195
7. The act of eighteen hundred and seven, (Aik. Dig. 278,) provides that where a writ is issued five days before court, it is regularly returnable to the next term; and it makes a writ abateable, if it be returnable at a term beyond that next to be holden.--*Findley et al. vs. Ritchie.*..... 452
8. A writ issued on the third of January, eighteen hundred and thirty-eight, and returnable on the fourth Monday in January next, is not illegal; and the word "next," in the writ, may refer to the *fourth Monday next after its date*, and not to January, eighteen hundred and thirty-nine.--*ib.*..... 452

CRIMES AND MISDEMEANORS.

1. The act of eighteen hundred and twenty-eight, inhibiting gaming, covers the whole ground of the previous sta-

- tutes, so far as the keeping, exhibiting, carrying on, or being in any manner interested in any gaming table or bank whatever, is concerned, and includes every offence connected with the subject matter.—*The State vs. Whitworth*..... 434
2. And as it provides a different, and in some respects a milder punishment for these offences, than the previous statutes; it repeals them, so far as the same offences are provided to be punished by it.—*ib.*..... 435
3. A faro-bank is within the words of the statute of eighteen hundred and twenty-eight; and the words “gaming table,” and “played with cards,” in an indictment for keeping a faro-bank, may be regarded as surplusage.—*ib.* 435
4. The statute provides that it shall be sufficient for the indictment to charge, that the defendant *did keep and exhibit a gaming table, or banks for gaming*, without averring or proving that money was won or lost, or bet on such table or bank.—*ib.*..... 435
5. Where it is proved, under an indictment for exhibiting a faro-bank, that defendant did exhibit a faro-bank, without stating that the exhibition was for the purpose of gaming .. it may be inferred that the exhibition was for that purpose.—*ib.*..... 435
6. The statute makes the value of property, maliciously injured or destroyed, the basis of the verdict under an indictment; and permits the jury to go to the extent of four fold its value; and the fine thus assessed is for the benefit of the injured party.—*The State vs. Garner*.... 447
7. An indictment, therefore, for maliciously injuring or destroying property, should contain an averment of the value of the property injured or destroyed.—*ib.*..... 447
8. The clerk of the circuit court has no authority to issue writs of error in any criminal case: such writs must originate from an application to the Supreme court.—*Bourne vs. The State*..... 458
9. And a writ thus improvidently issued will be dismissed.—*ib.*..... 458
10. The circuit courts are prohibited from referring any question of law to the supreme court, except such as are novel and difficult.—*ib.*..... 458
11. A bill of exceptions was not allowed at common law.—*ib.*..... 458
12. Where no intension to refer a case to the supreme court, is apparent on the record, it must, *pro defectu*, be repudiated.—*ib.*..... 458

13. In larceny, the criminal intention constitutes the offence, and is the only criterion by which to distinguish a larceny from a trespass.—*The State vs. Hawkins*. 461
14. To constitute larceny, it is not sufficient that the goods be taken for the purpose of destroying them; as, if one take the horse of another, for the purpose of destroying him, to injure his neighbor—and should destroy him—this would be malicious mischief, but not larceny.—*ib*. 461
15. Where a defendant assisted in secreting a slave, to the end that she might escape from her master, and obtain her freedom, but there was no intention to convert the property to the use of the defendant—an indictment for larceny could not be sustained.—*ib*. 461
16. Where the act of eighteen hundred and seven, (Aik. Dig. 102,) speaks of disabling a limb or member, a permanent injury is contemplated, such as at common law, would constitute *mayhem*; a temporary disabling of a finger, an arm, or an eye, is not sufficient to constitute the statutory offence.—*The State vs. Briley* 472
17. Precision of description is unnecessary in an indictment—all that the law requires, is a description of the offence in the words of the statute creating it,—except where technical language is used.—*ib*. 472
18. Where an indictment charges an offender against a statute, with doing the unlawful act, with malice aforethought, and contains proper allegations of time and place, with a formal commencement and conclusion, it is sufficient.—*ib*. 472
19. After a conviction on one count of an indictment, a motion in arrest of judgment cannot prevail.—*ib*. 472
20. On an indictment for stealing a slave, evidence is not admissible, of conversations held by the prisoner, with other slaves, eighteen miles from the place where the offence is charged to have been committed.—*The State vs. Wisdom*. 511
21. Though the *fact* that such prisoner was at a particular place, not far distant from the point where the crime was perpetrated, might be shewn, in order to trace him, step by step, to the place where the larceny was committed. *ib*. 511
22. But evidence of any act by the prisoner, or his general conduct, not connected with the crime, should not be received.—*ib*. 511
23. Evidence offered by a prisoner, of his assertion of a claim to property stolen, when he was arrested, cannot be

- received—such a claim must be asserted before, or at the taking, to enable the defendant to give evidence of his own declaration; and the *bona fides* of the assertion, is for the consideration of the jury.—*ib.*..... 511
24. The stealing of a slave cannot be established in any other or different manner, than the stealing of any other chattel endowed with volition, and the power of locomotion. Nor can an individual commit larceny in one county, who is, at the time of its commission, in another, and who is not near enough to assist those who are active in its perpetration.—*ib.*..... 512
25. An individual to whom a slave is hired is, *pro hac vice*, the owner of the slave during the term for which he is hired, and may be described as such, in an indictment for stealing the slave; but the insertion of the true owner's name, in an indictment, will not render the proof irrelevant. The indictment may be supported, by proof of possession by the person hiring the slave.—*ib.*..... 512
26. There is no repugnance in charging the ownership of the slave in different persons, in different counts of the same indictment.—*ib.*..... 512

DAMAGES.

1. In debt on foreign judgment, plaintiff is entitled to damages, to the extent of the interest allowed, at the place where the judgment was obtained.—*Maury vs. Cone et al.*..... 250
2. But in such a case, in the absence of a plea, the case ought to be submitted to a jury, on an inquiry of damages; and the statute of the place of the contract, which ascertains the value of money, ought to be produced, or the usage proved.—*ib.*..... 250
3. The action for a false warranty, is intended, not so much to punish the seller, as to compensate the purchaser for any injury he may have sustained.—*Hogan vs. Thorington.* 428
4. And in such cases, the measure of damages is the injury sustained by plaintiff, in consequence of the false warranty.—*ib.*..... 428
5. Where one warrants a slave to be sound, which was not so, but who afterwards recovered and became sound—the measure of damages is the sums paid for medical attendance, nursing, &c. which induced the recovery.—*ib.*..... 428
6. Inland bills of exchange, in this State, are regulated and governed by the same laws, usages and customs, which regulate and govern foreign bills of exchange, ex-

- cept in the amount of damages.—*Hanrick vs. The Farmers' Bank of Chattahoochee*. 539
7. Damages, other than interest, are never given by the law merchant, against an acceptor of a bill—as acceptor merely.—*ib.*. 539
8. In England the damages are estimated at the difference of exchange, and the expenses of forwarding.—*ib.*. 539
9. The decision (Minor 18,) founded on the English decisions, overruled.—*ib.*. 539
10. The clerk of the court has no power to ascertain the damages, but on a writing ascertaining the plaintiff's demand.—*ib.*. 539
11. Where the common money counts are added to a count on a bill of exchange—the clerk may compute the damages, without entering a *nolle prosequi* to the common counts.—*ib.*. 539
12. The only object of an enquiry of damages after a default, is the ascertainment of the amount to which the plaintiff is entitled—as every other matter is admitted by the defendant, to be as alleged in the declaration.—*Marshall & McLeod vs. White*. 551
13. The act which confers the right on a jury, to impose damages for vexatiously, or for delay, claiming property levied on under execution, no where requires that the jury, in giving damages, shall express, by their verdict, the causes which influenced them.—*Bettis, adm'r vs. Taylor*. 564
14. Where an administrator detains possession of personal property, to which another has a paramount title, the owner need not proceed against him in his fiduciary character, but may charge him personally: and the administrator, where the question is litigated in good faith, is entitled to be reimbursed his damages from the assets of the intestate.—*ib.*. 564

DEED.

1. A deed is not necessary in a conveyance of personal estate; a delivery passes title, as effectually as the most solemn instrument.—*Rochelle vs. Harrison*. 351
2. And such a delivery of a personal chattel, in derogation of the rights of creditors, is within the inhibition of the statute.—*ib.*. 351

DECISIONS OVERRULED.

1. The decision (Minor 18,) founded on the English deci

sions, overruled.—*Hanrick vs. The Farmers' Bank of Chattahoochie*..... 539

DEFAULT.

1. The only object of an enquiry of damages after a default, is the ascertainment of the amount to which the plaintiff is entitled—as every other matter is admitted by the defendant, to be as alleged in the declaration—*Marshall & McLeod vs. White*..... 551

DEMAND AND NOTICE.

1. By the law merchant, the endorser of a promissory note stipulates with the endorsee, and each subsequent holder, in the ordinary course of business, that if demand of payment is made by the maker at its maturity, and due notice of the non-payment given to him,—he, *himself*, will pay the note.—*Stephenson vs. Primrose*..... 155
2. No precise form of notice is required,—it may be verbal or in writing.—*ib*..... 155
3. And where the parties all reside in the same city, it is necessary, in order to fix the endorser's liability, that he be personally informed of the dishonor of the note, either verbally or in writing: or a notice should be left at his dwelling house or place of business.—*ib*..... 155
4. Therefore, where the holder, within proper time after the dishonor of the note, leaves a verbal or written notice, at the endorser's counting-room, or place of doing business, but it is not shewn to have been left during *the hours of business*, all the parties residing in the same city,—such notice would not be sufficient.—*ib*..... 155
5. But if the party entitled to notice, absent himself from his place of business *during the hours of business*, without leaving any one to attend to his interest,—the holder will be excused from giving notice *there*.—*ib*..... 155
6. But if the endorser has used the precaution to obtain an assignment of all the effects of the drawer or maker, to be applied to the payment of the paper endorsed, he cannot claim an exemption from liability, because he has not had regular notice of the dishonor of the bill or note.—*ib*... 155
7. So, if he has protected himself, by taking collateral security, *sufficient* to cover the endorsement, he impliedly waives his legal right to notice.—*ib*..... 155
8. Though, to this rule, there might be an exception.—*ib*.. 155
9. A room to which a man is accustomed to resort, but in which it is not shewn, that he carries on any regular trade

- or employment, cannot be considered his *place of business*.---*ib.*..... 156
10. And if the holder of paper call at a room thus resorted to, for the purpose of giving notice to its occupant of the dishonor of a note endorsed by him, at a time when he is absent—the holder is not excused from giving notice:—especially where the endorser has a dwelling house and livery stables within the same city, the latter of which he personally superintends.---*ib.*..... 156
11. No protest is necessary to fix the liability of the endorser of a promissory note.--a demand of payment at the time and place provided for it, with notice of such demand to the endorser, is all that the law requires.---*Quigley, adm'x vs. Primrose*,..... 247
12. A plaintiff is not held, in an action against an endorser, to strict proof of the time or place of demand of payment of a promissory note, when laid under a *scilicet*, and, in most cases, may make his proof conform to the legal effect of his declaration.---*ib.*..... 247
13. Each party to a bill of exchange or promissory note, whether by endorsement or mere delivery, has, in all cases, until the day after he has received notice, to give or forward notice to his prior endorser, and so on, till the notice reaches the drawer.---*Whitman & Hubbard vs. The Farmers' Bank of Chattahoochie*...... 258
14. *It seems*, that where the protest of a note states, that payment of the note was demanded at the proper time, and at the proper place, and that it was protested for non-payment—it is sufficient, without stating from whom payment was demanded, or what reply was given to the demand made.---*Curry vs. The Bank of Mobile*...... 360
15. Where the protest states, "that the endorsers have had due notice of the demand and non-payment, and protest of said note, by notice in writing, directed by me, as follows: To the endorsers," and left at their offices—it is sufficient; and an objection, that the place where the notice was left, is not described, and that the notary decides that the place is the office of the endorser, will not be sustained.---*ib.*..... 360
16. Notice of the dishonor of a note may be given on the same day the protest is made, and must be given on the next day, or placed in the post office, to be sent by the next mail.---*ib.*..... 360
17. *It seems* a notice is sent by mail to a distant post office,

- the place to which the letter containing the notice is directed, must be stated in the certificate of the notary.—*ib.*... 360
18. But where the parties live in the same town, and a notice is left at the place of business of the endorser—it is sufficient to describe it as the office of the person so notified.—*ib.*..... 360
19. The certificate of the notice by the notary, is *prima facie* evidence, only of the fact recited; and if left at the wrong place, the fact may be controverted.—*ib.*..... 361

DEMURRER TO EVIDENCE.

1. On a demurrer to evidence, where the evidence is not sufficient to maintain the issue,—the court will not award a *venire facias de novo*.—*Lea & Langdon vs. The Branch Bank at Mobile*..... 119
2. The office of a demurrer to evidence, is to withdraw from the jury, the consideration of the facts offered in evidence, to maintain the issue, which the jury were empaneled to try, and to refer them to the court. It is, in effect, the substitution of the court for the jury.—*Curry vs. The Bank of Mobile*..... 360

DEPOSITION.

1. Where the commissioner, appointed to take a deposition, has omitted to certify it by his signature, the deposition cannot be read in evidence; but the omission of the seals will not operate to exclude the depositions... *Dozier vs. Joyce*..... 303

DETINUE.

1. A defendant in detinue, is not allowed to give in evidence, as he might do in trover, that the property was delivered to him as a pledge.—*Bettis vs. Taylor*..... 564
2. Nor will it avail him, that the property was destroyed, or died, after suit brought.—*ib.*..... 564

DISCONTINUANCE.

1. A discontinuance as to one of the parties to a case, on whom the writ has been executed, is a discontinuance as to all.—*Gazzam et al. vs. Beebe & Co.*..... 49
2. To justify a di-discontinuance, against one who is sued as a partner, and on whom the process has been served, it should appear that he is not a member of the firm.—*ib.* 49
3. Where an action is brought against two defendants, and the writ is served on one only, and the plaintiff disconti-

- nues as to the defendant not served, he may, immediately after the discontinuance, issue fresh process against the defendant not served, and, if he be found, proceed to judgment against him... *Smith vs. Blakeney*..... 128
4. And the recitals in the writ, that the previous writ had issued against the defendant, and the party, as to whom the judgment was taken, will not avail in error--the defendant having appeared.--*ib*..... 128

DISTRIBUTEES.

1. The interest of one of several co-distributees is several, and does not, at his death, pass to his co-distributees. A distributee may, in his turn, become the foundation of a new stock, who may be persons other than those entitled with him to distribution.—*Maury's adm'r vs. Mason's adm'r*..... 213
2. A transfer of the interest of one of several distributees, parties to a particular suit, does not remove his disqualification, when offered as a witness in the cause.--*ib*..... 213
3. In distributing an estate, where parties in interest will not, or are incapable of consenting to an adjustment, the administrator should obtain permission to sell so much of the estate, as will enable him to make an equal division. *Teat vs. Lee, adm'r*..... 507
4. The statute, (Aik. Dig. 155,) delegates power to the judge of the county court, where the parties cannot agree, to ascertain, by testimony, the value of property brought into hotchpot, as a judicial officer; or to cause a jury to be impanneled for that purpose. It is error, therefore, for commissioners to make the valuation, or for the court to confer authority to that effect.--*ib*..... 507
5. The law no where authorises the rendition of decrees, and the award of execution thereon, against distributees, for balances against them on distribution.--*ib*..... 507

DOWER.

1. A widow is not entitled to dower, of lands once purchased of the United States, but which have been subsequently forfeited.—*Rodgers vs. Rawlings*. 326

ENDORSER.

1. Where A endorses a bill of exchange in blank, with an understanding that it is to be accepted by B, and this understanding is communicated to C, who purchases the bill, before the purchase; and the bill is not accepted by B,

- but by some other person,---A, the endorser is not liable on his endorsement, to C, the holder.- *Inge vs. The Branch Bank of Mobile*. 108
2. The acceptor of a bill is primarily liable to pay the bill, and the drawer and endorser, if the proper steps are taken to charge them, are liable on the default of the acceptor---but the endorser is liable, in no instance, to the acceptor, unless in case of an acceptance for the honor of the endorser.---*ib*. 108
3. But an agreement between the holder of a bill, and the acceptor, that the holder will not look to the acceptor for payment of the bill, until the holder has exhausted, without success, the legal remedies against the endorser, will operate to discharge the endorser.---*ib*. 108
4. Notice by an endorser, who has paid a bill of exchange in bank, that he will move for judgment against his principal, at the next term of the court, loses its efficacy, by a failure to proceed on it, at the term fixed for its return.--- *Parsons & Co. vs. Lee & Norton*. 125
5. Such a notice is entirely under the control of the party issuing it, until he shall move upon it, and cannot be regarded as *process, matter or thing depending*; and consequently is not continued in force by the statutes, which provide for cases of failure to hold a court, or dispose of the business therein.---*ib*. 125

ENDORSEMENT.

1. A legal title to a note payable to the order of the maker, can only be derived from his endorsement.---*Lea & Langdon vs. The Branch Bank at Mobile*. 119
2. Such note is of no validity until endorsed; and until then, the maker cannot be sued.---*ib*. 119
3. But when endorsed, the note becomes perfect, and the party may be treated as the maker.---*ib*. 119
4. And if a subsequent endorser be sued, the holder may derive title to the paper, through the endorsement of the maker.---*ib*. 119
5. The deliberate cancellation by the holder, of an endorsement on a note, discharges the liability of such endorser, to the holder; and so operating, it will also discharge from liability to the holder, the subsequent endorser.--- *Curry vs. The Bank of Mobile*. 361
6. Thus, the holder of a note or bill of exchange, seeking to effect a recovery on such note, against an endorser, cannot prejudice the right of such endorser, by striking

- out the name of a previous endorser, who would be liable to the last.-- *ib.* 361
7. Though, *it is said*, the situation of the endorser, whose name is stricken out, might be explained--as, that he was an accommodation endorser, and not responsible to, his immediate endorser, in any event.-- *ib.*..... 361

ERROR, ASSIGNMENTS OF.

1. The proceedings of a justice of the peace, in a case of forcible entry and detainer, can only be reviewed in the circuit court on such errors, as the attention of the court is called to, by an assignment,--and an omission to make one, is fatal.--*Murray vs. Williams.*..... 47

ERROR, AND WRIT OF.

1. Where a writ of error is presented on a judgment at law, and annexed thereto appears a decree in chancery,---the two cases cannot be thus confounded so as to authorise this court to consider the errors assigned on the decree.--*McGill vs. Diamond.*..... 296
2. The clerk of the circuit court has no authority to issue writs of error in any criminal case: such writs must originate from an application to the Supreme court.--*Bourne vs. The State.*..... 458
3. And a writ thus improvidently issued will be dismissed. *ib.*..... 458
4. Where one complains of an error in an inferior tribunal --to be entitled to redress, he must shew he is prejudiced by it.--*Hrans et al. vs. Bolling.*..... 546
5. But where a defendant, in order to make out a defence, proposes to show, that the consideration of a bond sued on, is a bond which is lost, and in his effort to show the contents of such lost bond, is arrested by an improper decision of the court,--these facts sufficiently exhibit the pertinency of the proof, to authorise the action of this court.--*ib.*..... 546
6. An appeal or writ of error does not lie from an interlocutory order of the county court.--*Merrill vs. Jones.*..... 554
7. A judgment of the circuit court, on a writ of error, to revise an *interlocutory* order of the county court, though obtained with the consent of parties, will be set aside. --*ib.*..... 554
8. And where the proceedings in the circuit court, might operate as a bar to a review of the same matters, when properly presented, after *final* judgment below, the pro-

ceedings will be set aside, and the writ of error dismissed.—*ib.*..... 551

ESTATE.

1. To enable the supreme court to review a case, under the act of eighteen hundred and thirty-three, (Aik. Dig. 253,) where commissioners had been appointed, by a judge of the circuit court, to settle the estate of a decedent, the judge of the orphans' court being interested, the commission issued by the judge of the circuit court should appear of record... *Lister vs. Vician et al.*..... 375
2. Its existence and legality cannot be supplied by intendment, or by a recital in the minutes of the clerk of the county court, or the report of the commissioners.—*ib.*... 375
3. And the report of two of the commissioners, is not a decree revisable in error, and an execution issued on such a report of commissioners, may be quashed on motion.—*ib.*..... 375
4. In distributing an estate, where parties in interest will not, or are incapable of consenting to an adjustment, the administrator should obtain permission to sell so much of the estate as will enable him to make an equal division. *Teat vs. Lee, adm'r.*..... 507
5. The statute, (Aik. Dig. 155,) delegates power to the judge of the county court, where the parties cannot agree, to ascertain by testimony, the value of property brought into hotchpot, as a judicial officer; or to cause a jury to be impaneled for that purpose. It is error, therefore, for commissioners to make the valuation, or for the court to confer authority to that effect.— *ib.*..... 507
6. The law nowhere authorises the rendition of decrees, and the award of execution thereon, against distributees, for balances against them on distribution.—*ib.*..... 507

EVIDENCE.

1. If the evidence offered in a case, does not conduce or tend to prove the facts in issue, a motion should be made to exclude it from the consideration of the jury: but when the evidence tends to prove the issue, though not conclusive such a motion cannot prevail.—*McKenzie vs. McRae, adm'r.*..... 70
2. Where evidence is circumstantial and not conclusive, the jury are sole judges of the effect of the testimony, and are alone capable of deducing inferences from it. —*ib.*... 70
3. Evidence that the note sued on is not the property of

- plaintiff, may be given, under the general issue.—*Evans vs. Gordon*..... 142
4. Evidence, which has *prima facie* no pertinence to the issue, is rightfully rejected.—*Innerarity vs. Byrne*..... 176
5. Where a party claims the benefit of an exception to this rule, he must bring himself within it by pleading or proof.—*ib.*..... 176
6. A transfer of the interest of one of several distributees, parties to a particular suit, does not remove his disqualification, when offered as a witness in the cause.—*Maurry's adm'r vs. Mason's adm'r.* 213
7. And a bill will not be dismissed, without prejudice, to enable a witness in a future suit, to tender a suitable release to restore his competency.—*ib.*..... 213
8. If a witness, whose deposition has been taken on the ground of his being about to leave the state, remain until the trial of the cause—his deposition cannot be read in evidence.—*Goodwyn vs. Lloyd*..... 237
9. But the failure, on the part of a witness, thus situated, to put his determination of leaving the state into execution, until after a term of the court has elapsed, will not deprive the party of the benefit of his testimony, if he leaves the state before the trial of the cause.—*ib.*..... 237
10. And his death, within the state, before he executes his determination of leaving it, affords as good ground for using his testimony, as his absence from the state, at the time of the trial.—*ib.*..... 237
11. A plaintiff is not held, in an action against an endorser, to strict proof of the time or place of demand of payment of a promissory note, when laid under a *scilicet*, and, in most cases may make his proof conform to the legal effect of his declaration.—*Quigley adm'r vs. Primrose*... 247
12. No authority is given by statute to a notary public, to certify a fact in regard to a bill of exchange, independent of the protest.—*Whitman & Hubbard vs. The Farmers Bank of Chattahoochie*..... 258
13. If written evidence be by the court improperly suffered to go to the jury, to prove a fact indispensable to support the action, and competent evidence conclusively proving the same fact, be afterwards offered and received—the error of admitting the improper evidence is not cured. And, in such case, the error of allowing the improper written evidence, can only be cured by withdrawing from the jury the written evidence offered, as it cannot

- be known which of the two modes of proving the fact, was relied on to support the action.—*ib.*..... 258
14. A record in chancery must shew affirmatively all the evidence necessary to sustain it.—*Singleton vs. Gayle.*.. 270
15. Where the language of the master's report is such as to warrant the belief that the bond and mortgage had been produced before him and proved, it will be sufficient; but where the report does not warrant such a belief—the production and proof before him of the bond and mortgage will not be presumed.—*ib.*..... 270
16. The statute making an instrument of writing evidence of the debt or duty for which it was given, does not apply to suits in chancery.—*ib.*..... 270
17. Before a decree is pronounced, on a bill taken *pro confesso*, the court must be satisfied by sufficient evidence, of the justice of complainant's demand.—*ib.*..... 270
18. The answer of one defendant in chancery, cannot be read as evidence to charge a co-defendant.—*ib.*..... 271
19. Where the commissioner, appointed to take a deposition, has omitted to certify it by his signature, the deposition cannot be read in evidence; but the omission of the seals will not operate to exclude the depositions... *Dozier vs. Joyce.*..... 303
20. A witness cannot be examined in any distinct collateral fact, for the purpose of impeaching his testimony afterwards.—But if the witness voluntarily swears falsely, in relation to matters not within the issue, he may be impeached by contradicting him.—*ib.*..... 303
21. The circumstances under which plaintiff's property went into possession of the intestate of a defendant administratrix, may be shewn, in detinue, by proving a request from defendant to plaintiff to that effect, in the lifetime of her husband.—*Rochelle vs. Harrison.*..... 351
22. A promise, under seal, to make a title in fee simple at some future time, to land, provided, the passage of an act of congress can be obtained, to authorise such a conveyance; is properly rejected when offered as evidence, to establish title in a defendant in trespass.—*James vs. Tait et al.*..... 476
23. The conduct of a cause in court, is entrusted to the discretion of the presiding judge, and he may, when necessary, permit a party to introduce evidence, after the testimony is closed.—*ib.*..... 476
24. Where words are actionable in themselves, it is not necessary to lay special damages, and no evidence of special

- damage can be received, unless specially averred.--*Johnson vs. Robertson & wife*..... 486
25. Though a plaintiff may enhance damages by proof of special damages, it does not follow that the jury are confined, in estimating the damages, to the pecuniary loss proved; they may compensate the injured party, taking into consideration, not only his pecuniary loss, but all the circumstances of the case.--*ib*..... 486
26. A witness cannot be asked, in slander, if he knows of other persons refusing to employ plaintiff, by reason of the slanderous words spoken, than those mentioned in the declaration.--*ib*..... 486
27. Matter admissible under a plea of *liberum tenementum*, may be given in evidence under the general issue.--*Dcan vs. Fail*..... 491
28. The general rule, on the subject of permitting testimony to be given, of matters not alleged, is, that nothing shall be given in evidence, which does not directly tend to the proof or disproof the matter in issue.--*The State vs. Wisdom*..... 511
29. On an indictment for stealing a slave, evidence is not admissible, of conversations held by the prisoner, with other slaves, eighteen miles from the place where the offence is charged to have been committed.--*ib*..... 511
30. Though the *fact* that such prisoner was at a particular place, not far distant from the point where the crime was perpetrated, might be shewn, in order to trace him, step by step, to the place where the larceny was committed. *ib*..... 511
31. But evidence of any act by the prisoner, or his general conduct, not connected with the crime, should not be received.--*ib*..... 511
32. Evidence offered by a prisoner, of his assertion of a claim to property stolen, when he was arrested, cannot be received--such a claim must be asserted before, or at the taking, to enable the defendant to give evidence of his own declaration; and the *bona fides* of the assertion, is for the consideration of the jury.--*ib*..... 511
33. An instrument of writing produced in pursuance to notice to that effect, may be read by the party who has required the production: but, if he does not choose to give it in evidence, the mere notice will not have the effect to allow the party in whose possession it has been, to read it without proof.--*ib*..... 511
34. The best evidence the subject admits of, must always be

- produced; and if evidence of an inferior grade is offered, it raises the presumption, that the higher testimony is withheld for some sinister purpose.—*Mordecai vs. Beal.* 529
35. Before evidence of an inferior grade is permitted to be adduced, the court will require satisfactory proof that better evidence is not voluntarily withheld; and the sufficiency of such proof is a question for the discretion of the court, to be governed by the circumstances of the case.—*ib.* 529
36. Where a party proved that a deed under which he claimed, a personal chattel once existed, and was in the possession of one who had intermarried with the grantee of the deed, and resided beyond the limits of the state; that the deed had been demanded, but not produced; that enquiry had been made, without effect, of other persons, who, it was supposed, might have possession of it: and where there was an offer to prove its contents, by a registered copy—it is sufficient: and inferior evidence of the contents of the deed may be admitted.—*ib.* 529
37. Where one, by his will, appointed certain agents to make a division of his personal estate, and, in case of the death of either of them, authorised the survivor to appoint others in the place of those deceased, to assist in making the division—a recital contained in a paper, purporting to be the evidence of such division, and made by agents purporting to have been appointed by the survivor, is not sufficient evidence of the fact of the appointment. Proof of the fact, against one not claiming under the paper, purporting to be a division, must be made by evidence *aliunde*.—*ib.* 529
38. Where the loss of an instrument proposed to be offered in evidence, is satisfactorily proved, the law permits secondary evidence to be given of its contents.—*Evaus et al. vs. Bolling.* 546
39. The most unexceptionable mode of proving the contents of a lost instrument, is by a sworn copy; and where the copy is true it is proof of the same grade, and entitled to the same credence as the original.—*ib.* 546
40. Where the subscribing witness handed a bond to the clerk, who copied it—the copy made by the clerk, is satisfactory evidence of the contents of the original.—*ib.* 546
41. But the subscribing witness cannot be allowed to refresh his memory, as to the contents of the lost bond, by reference to the copy made by the clerk.—*ib.* 546
42. A witness, *it seems*, may be allowed to refresh his memory, by looking at a memorandum he made at the time

- the occurrence took place, to which he is called to testify; but must swear, not from the fact of his having written it down, but to the fact itself---*ib.*..... 546
43. Where a defendant, in order to make out a defence, proposes to show that the consideration of a bond sued on, is a bond which is lost, and in his effort to show the contents of such lost bond, is arrested by an improper decision of the court,—these facts sufficiently exhibit the pertinency of the proof, to authorise the action of this court. —*ib.*..... 546

EXECUTION.

1. If a defendant in execution have property in the county, it is the sheriff's duty to levy upon it, unless it be exempted from seizure by law.---*Bell et al. vs. King*..... 147
2. The lien of an execution does not depend upon contract, but is given by law, and imparts to the elder the right of satisfaction, in preference to one that has subsequently gone into the sheriff's hands.---*ib.*..... 147
3. Yet this preference of an older over a younger execution creditor, does not excuse the sheriff from a levy of the latter execution, where the property is not needed to satisfy the former.---*ib.*..... 147
4. A return of *nulla bona* cannot be justified by the proof of a prior lien, unless the executions creating it were actually levied.---*ib.*..... 147
5. In order to comply with the law, authorising executions to be forwarded to other counties, (Aik. Dig. 170,) the sheriff must deposit a copy of the execution in the clerk's office, of the county to which it is sent, and must endorse on it, a copy of the return made by him to the original—and unless this is done, the copy would not, *in itself*, be evidence on a trial of the right of property, in the goods levied on.---*Bettis, adm'r vs. Taylor*..... 565
6. But the act is merely affirmative, and does not exclude every other mode of proving a copy of the execution.—An examined, or sworn copy, is admissible.---*ib.*..... 565
7. *Aliter*, where the issue is *nul tiel record*, in which case the record must be produced, *sub pede sigilli*, or otherwise made authentic, in itself.---*ib.*..... 565

EXECUTORS AND ADMINISTRATORS.

1. The seller of personal chattels impliedly stipulates that the article sold is his own, and that he will indemnify the buyer for the loss, if the title is in another person.---*Ricks, adm'r vs. Dillahunty*..... 133

2. But a sale by an executor, administrator, or other trustee, forms an exception to the rule, and does not imply a warranty of title, unless there be fraud, or perhaps, in some instances, gross negligence.—*ib.*..... 133
3. The payee of a note made to him, as administrator, may sue on the note in his own name, and so, also, the endorsee of a promissory note received by him, as administrator, may maintain action on the note in his own name.—*Evans vs. Gordon.*..... 142
4. The right of an administrator to the possession of personal property of his intestate, is not impaired by an injunction forbidding its distribution.—*McCutchen, adm'r vs. McCutchen.*..... 151
5. At common law, actions that arise from contracts, for the payment of money, or for the performance of duties where property is in question, survive to the executor or administrator—actions for injuries to the person, character or property of individuals, die with the person.—*Nettles adm'r vs. Barnett.*..... 181
6. The statutes modifying this rule, do not extend relief against the executor or administrator, for an injury to personal property, committed by the testator or intestate.—*ib.* 181
7. The statute of eighteen hundred and twenty-six, provides that all actions of trespass *quare clausum fregit*, and actions to recover damages for injuries to personal property, may, if the *plaintiff* dies, be revived by his executor or administrator, in the same manner as actions on contracts, but does not apply to *defendants.*—*ib.*..... 181
8. Trover, where property has been converted, or an action for money had and received, on an implied contract, waiving the injury, may be maintained against an executor or administrator, where the property has been sold by a testator or intestate; and if the property be in specie, in the hands of the personal representative, he can be made personally amenable for it.—*ib.*..... 181
9. But an action of trespass proper, does not survive against the representative of the wrong doer, where commenced in his life time; and in such case the representatives cannot make themselves parties to the suit.—*ib.*..... 181
10. As the property devised or bequeathed to infant devisees—legatees, most usually goes into the possession of their guardians, after the executor shall have collected the estate of the testator, and paid his debts; in order to allow it to remain with the executor, or to receive any other than

- its accustomed destination, the intention of the testator should appear from plain language, or clear implication.
Heirs of Capel vs. McMillan, adm'r...... 197
11. The representative of one who, at an administrator's sale, purchased, for an inadequate price, slave, assumed to be subject to a mortgage which had lost its lien, is a necessary party to a bill filed by the mortgagee, seeking to foreclose the mortgage, to protect the interest of creditors; and without making such representative a party, no decree can be had in the cause.—*Ningleton vs. Gayle*..... 270
12. An executor who has one of the slaves in possession, should also be made a party to the bill.—*ib.*..... 270
13. Notice of the existence of a lien, admitted by one who purchased at an administrator's sale, under the lien, cannot bind those who claim under the purchaser.—*ib.*..... 271
14. A decree cannot be rendered against defendants, as executors *de son tort*, who are not sued in that character.—*ib.* 271
15. Where one is charged, as administrator of an estate, a decree cannot be rendered against him as a purchaser, with notice of a lien in favor of a complainant, seeking to enforce the lien.—*ib.*..... 271
16. At common law, when a administration was revoked, pending a suit, the revocation might be pleaded in discharge of the action, but it was necessary for the plea to allege an administration of the effects, or that they had been delivered to the succeeding administrator.—*Driver vs. Riddle*..... 343
17. An executor cannot avoid his liability to settlement of the estate of his testator in the orphans' court, by resignation.—*ib.*..... 343
18. The act of eighteen hundred and twenty-one, (Aik. Dig. 179,) authorises an administrator to resign his authority, but, provides that he and his securities shall continue bound for all assets not duly administered, or delivered to his successor.—*ib.*..... 343
19. An administrator or executor, therefore, cannot, by a resignation of his authority, avoid any of the liabilities imposed on him by law,—and he can only be discharged from an action, by shewing an administration or want of assets.—*ib.*..... 343
20. Where the consideration of the note, is effects, which belonged to an estate of which the plaintiff is executor, the contract is considered as made with the *individual*, and he need not declare in his *representative* character in a suit on the contract.—*Evans vs. Gordon*..... 346

21. Where a negotiable note is endorsed immediately to a plaintiff, suit may be brought by him on such endorsement against the endorser, without disclosing that he received it as an executor.—*ib.*..... 346
22. Neither the common or statute law give to an executor *virtute officii*, a right to the possession of the testator's lands—if they are devised, they pass by the will to the devisee, who has a right to entry and possession; if undevisee, they descend to the heir, who is entitled to possession... *Leavens vs. Butler, et ux.*..... 380
23. If the real estate is wanting to pay debts, the executor may obtain an order for the sale of so much as is necessary, and the right to sell, in such a case, is a naked power, and cannot be defeated by alienation or disseisin.—*ib.* 389
24. Where power is given by a will to sell lands, it does not require, in order to its validity, the co-operation of the executors named—the power is attached to the office, and one executor, who has alone qualified, possesses all the power conferred by the will.—*ib.*..... 380
25. Where an executor voluntarily answers interrogatories, which he could not be compelled to answer—the answers will be regarded as evidence *de bene esse*.—*ib.*..... 381
26. Executors and administrators are, in almost every respect, considered in equity, as trustees.—*ib.*..... 381
27. The county court cannot decree distribution of an estate against an executor, where, by so doing, the testator's intention would be defeated.—*ib.*..... 381
28. Where one accepted a lease from an administrator, and undertook to pay him rent, he was not allowed to object a want of title in the administrator.—*Terry vs. Ferguson, adm'r.*..... 500
29. An administrator is not required to exercise a control over the real estate of his intestate,—yet, if he assume to lease it, he will hold the rent in trust for those legally entitled.—*ib.*..... 500
30. In distributing an estate, where parties in interest will not, or are incapable of consenting to an adjustment, the administrator should obtain permission to sell so much of the estate, as will enable him to make an equal division. *Teat vs. Lee, adm'r.*..... 507
31. The statute, (Aik. Dig. 155,) delegates power to the judge of the county court, where the parties cannot agree, to ascertain, by testimony, the value of property brought into hotchpot, as a judicial officer; or to cause a jury to be im-

- panneled for that purpose. It is error, therefore, for commissioners to make the valuation, or for the court to confer authority to that effect.---*ib.*..... 507
32. The law no where authorises the rendition of decrees, and the award of execution thereon, against distributees, for balances against them on distribution.---*ib.*..... 507
33. The assent of an executor to a legacy, vests in the legatee the legal title,---the assent having relation to the will, the source of the legatee's title.---*Mordecai vs. Beal.*... 529
34. But an executor cannot, by any act, under pretence of assent, enlarge or abridge the title of the legatee.---*ib.*... 529
35. Letters of administration are but evidence of authority, and an administrator may act without them, if the records of the court shew his appointment.---*Hosey, adm'r vs. Brasher.*..... 539
36. When an order of the orphans' court is made, requiring a defendant to appear in court, enter into bond, and take the necessary oaths, as administrator; and in an order of publication, eighteen months afterwards, he is recognised as administrator: it will be intended that he complied with the previous requisitions, and took upon himself the administration.---*Hosey, adm'r vs. Brasher.*..... 539
37. *It appears*, that the law does not require either the bond or oath of an administrator to be recorded.---*ib.*..... 559
38. In England, an examined copy of the act-book, stating that letters of administration have been granted to a defendant, is proof that he is administrator; although no notice was given to produce the letters of administration... *ib.*..... 559
39. Where an administrator detains possession of personal property, to which another has a paramount title, the owner need not proceed against him in his fiduciary character, but may charge him personally; and the administrator, where the question is litigated in good faith, is entitled to be reimbursed his damages from the assets of the intestate.---*Bettis vs. Taylor.*..... 564
40. And the rule, that he who detains property from the rightful owner, is liable, is so strict, that where there are several executors, and one only has possession, he alone can be sued.---*ib.*..... 564
41. Thus, an administrator, who, as such, interposes a claim to property levied on by execution, will be liable, individually, for the forthcoming of the property, even if destroyed, or if it dies, after the claim is interposed, and the property goes into his possession... *ib.*..... 564

42. *It seems*, that one, interposing such claim, as administrator, while incurring, by the stipulations of his own bond, personal responsibility,—might make good the issue on his part, by showing title in his intestate.—*ib.*..... 565
43. Where an administrator, in such case, is forced to expend money, to protect the estate of his intestate, the court that settles his accounts can do him justice.—*ib.*..... 565
44. Several joint executors were, at common law, considered as but one person.—*Williams & Ivey vs. Sims et al.* 579
45. At common law, all the executors named in a will, were required to join in prosecuting suits; and in actions against executors, *might* be made defendants—but in the last case, all who proved the will, were required to be joined.—*ib.*..... 579
46. The non-amenability of a co-executor to the jurisdiction of an English court, affords no legal excuse for the omission to join him as a party defendant, if he be living, and has taken upon himself to execute the will.—*ib.*.... 579
47. In England, service of a writ may be perfected on an absent co-defendant, by process of outlawry.—*ib.*..... 579
48. But the American cases do not support the English rule.—*ib.*..... 579
49. The statutes of this state, relating to joint-obligors, do not embrace joint-executors; and are defective, in not providing a mode of proceeding, where a co-executor resides without the state.—*ib.*..... 579
50. The non-residence of a co-executor, is sufficient to relieve the plaintiff from the necessity of joining him in an action with his co-executors.—*ib.*..... 579

FORCIBLE ENTRY AND DETAINER.

1. The proceedings of a justice of the peace, in a case of forcible entry and detainer, can only be reviewed in the circuit court on such errors, as the attention of the court is called to, by an assignment,—and an omission to make one, is fatal.—*Murray vs. Williams.*..... 47
2. In proceedings before a magistrate, of forcible entry and detainer, force is the *gist* of the action.—*Botts vs. Armstrong* 57
3. And taking possession of the premises of another, and sending off his slaves, will, under the statute, amount to the force necessary to maintain this proceeding.—*ib.*.... 57
4. Though taking peaceable possession of the premises of another, under color of title, will not authorise the action of forcible entry and detainer.—*ib.*..... 57

5. Where the consideration of the evidence, shewing the circumstances connected with the entry of defendant upon the premises, is taken from the jury, by the charge of the court, the case will be remanded.—*ib.*..... 57
6. A peaceable entry may be converted into an unlawful detainer, if possession is unlawfully withheld from the person entitled to possession.—*ib.*..... 57

FORFEITURE.

1. By the terms of the act of congress of the tenth of May eighteen hundred, a forfeiture did not accrue *immediately* on the failure of a purchaser of lands, to pay within the period of time for which a delay of payment was given. The lands did not revert, until after they were *again* offered for sale in the manner specified in the act. *Rogers vs. Rawlings et al.* 325
2. The act of congress of the second of March, eighteen hundred and twenty-one, was a proposal to extend the term of payment many years, and required of the party accepting of the extension, to make a written declaration of his assent to the provisions of the act: one of which declared, that the land on which the further credit was taken, should be *ipso facto* forfeited to the United States, if the payments were not made within three months after the day appointed for the payment of the last instalment,—which became due on the thirtieth of September, eighteen hundred and twenty-eight.—*ib.*... 325
3. A forfeiture under this, and similar acts, requires no act of entry on the part of the United States, to make it complete and effectual.—*ib.*..... 325
4. The acts of congress of eighteen hundred and thirty, and eighteen hundred and thirty-one, do not revive the estates of purchasers, previously forfeited to the United States.—*ib.*..... 325
5. The act of the thirty-first of March, eighteen hundred and thirty, gives a right of pre-emption to lands forfeited, to the purchaser, until the fourth of July, eighteen hundred and thirty-one, upon their paying the minimum price per acre, in addition to the amount theretofore paid thereon and forfeited; provided the price, including what had been paid, and the amount to be paid, should exceed three dollars and fifty cents per acre.—*ib.*..... 325
6. And where one had paid more than three dollars and fifty cents per acre when the purchase was made, his heirs

- and assigns became entitled to a patent, without paying any more money.—*ib.* 326
7. The act of the twenty-fifth of February, eighteen hundred and thirty-one, extended a similar benefit to the purchasers, their heirs or assigns, of all the forfeited lands which originally sold for less than fourteen dollars; if one dollar and twenty-five cents per acre had been, or should thereafter be paid.—*ib.* 326
8. But the creditor of a purchaser, has no legal or equitable right, to insist on the gratuity bestowed in the act.—*ib.* 326
9. A widow is not entitled to dower, of lands once purchased of the United States, but which have been subsequently forfeited.—*ib.* 326

FRAUDS, STATUTE OF.

1. If money be given to one person to deliver to a third, the right to the money is transferred to the latter, and he may maintain action.—*Hitchcock et al. vs. Lukens*..... 333
2. Nor does the statute of frauds interpose a barrier to a recovery in such a case—as the undertaking is not to answer for the debt, default or miscarriage of another, but to pay the money of another *already received*, or *when received*, to a third person.—*ib.* 333
3. A contract for the sale of negroes, which is *executory*, and which is intended to defraud creditors, does not pass the title: and an action brought on the contract, by the vendee, against the vendor, for the slaves, cannot be maintained.—*Rochelle vs. Harrison*..... 351
4. The act to prevent frauds and perjuries, (Aik. Dig. 207,) avoids all gifts or conveyances in fraud of the rights of creditors—only, however, in favor of creditors and purchasers.—*ib.* 351
5. And such a delivery of a personal chattel, in derogation of the rights of creditors, is within the inhibition of the statute.—*ib.* 351
6. In Massachusetts, a distinction is made between actual conveyances, and contracts sought to be enforced: the latter may be avoided—the former are binding.—*ib.*.... 352
7. But in New York and Ohio, conveyances void by statute, as against creditors and purchasers, are binding between the parties.—*ib.* 352

GAMING.

1. The act of eighteen hundred and twenty-eight, inhibit-

- ing gaming, covers the whole ground of the previous statutes, so far as the keeping, exhibiting, carrying on, or being in any manner interested in any gaming table or bank whatever, is concerned, and includes every offence connected with the subject matter.—*The State vs. Whitworth*..... 434
2. And as it provides a different, and in some respects a milder punishment for these offences, than the previous statutes; it repeals them, so far as the same offences are provided to be punished by it.—*ib.*..... 435
 3. A faro-bank is within the words of the statute of eighteen hundred and twenty-eight; and the words "gaming table," and "played with cards," in an indictment for keeping a faro-bank, may be regarded as surplusage.—*ib.* 435
 4. The statute provides that it shall be sufficient for the indictment to charge, that the defendant *did keep and exhibit a gaming table, or bank for gaming*, without averring or proving that money was won or lost, or bet on such gaming table or bank.—*ib.* 435
 5. Where it is proved, under an indictment for exhibiting a faro-bank, that defendant did exhibit a faro-bank, without stating that the exhibition was for the purpose of gaming—it may be inferred that the exhibition was for that purpose.—*ib.*..... 435

GIFT.

1. Delivery of possession is an essential ingredient, in a gift of personal property, but a *change of possession* is not indispensable.—*Sims vs. The adm'r of Sims*..... 449
2. Every delivery of a chattel, with intent to give it to another, operates a *legal* change of possession, and transfers dominion over the subject of the gift, to the donee.—*ib.*.. 449
3. The fact that a slave, given by a parent to a child, remains at the residence of the donor, may be explained by the circumstance, that the residence of the donor, is also that of the donee.—*ib.*..... 449
4. And is a proper subject for the consideration of a jury, when enquiring into the truth and reality of the gift.—*ib.* 449

GRANT.

1. Where the term "river," is used in a grant, as a boundary—high, or low water mark must be intended—not a middle point.—*Hagan et al. vs. Campbell and Cleave-land*..... 10
2. A plat or plan of survey may be referred to in a grant,

- and become part of it; showing the proper lines, and ascertaining the locality.—*ib.*..... 10
3. Where a line is described in a grant, as running towards one of the cardinal points, it must run directly in the course, unless controlled by some object.—*ib.*..... 10
4. And, where the distance marked out in a plat, cannot be included, by allowing the lines to deviate, the grant which refers to the plat, must be construed to mean, that the lines shall be extended without a variation of course.—*ib.* 10
5. Ignorance of *fact* by a grantor, in regard to assertions in a grant, describing undeserved merit to a grantee, will not control the language of the grant, or limit its operation in favor of one, not claiming under a subsequent grant from the same source.—*ib.*..... 10
6. Where, in a grant of lands, bounded by a river, a free passage or road is reserved, such reservation does not prevent the freehold of all the lands embraced in the grant, from vesting in the grantee; or limit his riparian rights: the *use* of the road only is reserved.—*ib.*..... 10
7. The grant made by the British Government, in seventeen hundred and sixty-seven, to William Richardson, of a certain tract of land in the district of Mobile, on the west side of the river Mobile, conferred on the grantee, in that grant, a title to high water mark, only.—*ib.*..... 11
8. But the confirmation of that grant to John Forbes & Co. in eighteen hundred and seven, conveyed to the grantee, *all* the lands lying east of the original tract, to the channel of the river.—*ib.*..... 11
9. And, to embrace *all* the intervening soil, the north and south lines of the original tract, held, properly to run, without variation of course, from high water mark to the margin of the channel..*ib.*..... 11
10. By these grants, and each of them, there was conferred upon the grantees, or their assignees, the right to the gradual increase of soil, by the receding of the river..*ib.* 11
11. Grants made by the Spanish authorities in this country, after the date of the treaty of St. Ildefonso, (1st October, 1800,) except those to actual sellers acquired before December twentieth, eighteen hundred and three, are null and void... *Innerarity vs. Byrne.*..... 176

GUARDIAN AND WARD.

1. Possession of lands by a guardian, in *socage*, is the possession of the ward: the possession of a bailee, is the posses-

- sion of the bailor, and the possession of a guardian is also possession of the ward... *Magee vs. Toland*..... 36
2. The possession of the guardian of an infant female ward, is the possession of the ward; and if the ward marry, the possession, *eo instanti*, is transferred to the husband, and the chattel is then in possession of the husband, in point of law, as much as it could afterwards be, by an actual *manucaption*... *ib*..... 36
 3. As the property devised or bequeathed to infant devisees --legatees, most usually goes into the possession of their guardians, after the executor shall have collected the estate of the testator, and paid his debts; in order to allow it to remain with the executor, or to receive any other than its accustomed destination, the intention of the testator should appear from plain language, or clear implication. *Heirs of Capal vs. McMillan, adm'r*..... 197
 4. A mother has the second title to the guardianship by nature, which becomes paramount by the death of the father --yet the guardian by nature is not entitled to possession of the child's estate... *ib*..... 198
 5. Where property is left by a testator to his minor children, to be given them when they respectively arrive at the age of twenty-one years, or marry, and to be managed by his widow, during her widowhood..the control of the property by the widow ceases upon her marriage: and the right to the possession and control of the property, vests in the guardian of the minors... *ib*. 198

HUSBAND AND WIFE.

1. The actual enjoyment of a chattel which accrues to the wife, before marriage, is not necessary to vest her interest in the husband... *Magee vs. Toland*..... 36
2. If a chattel be found, and not converted to the use of the finder, or if it be hired or loaned, or otherwise bailed; it does not thereby, become a chose in action: and if it belong to a woman, who marries, her right immediately vests in the husband, at least so far, that if she dies, it will survive to him... *ib*..... 36
3. Where property is given or bequeathed to a married woman without any qualification of the manner in which it is to be possessed or enjoyed, it vests, subject to the ordinary legal and marital rights of the husband.--*Lamb trustee, vs. Wragg and Stewart*..... 73
4. But if it appear from the deed, or other instrument which transfers the property, that it was the intention of the do-

- now or testator, that the wife should have an estate therein to her own separate use and disposal, such intention shall take effect, if it be fairly and clearly expressed.--*ib.* 73
5. The law favors the marital rights of the husband, and will not consider them to be interfered with, by any disposition of property, made for the wife's benefit, unless there is a clear exclusion of his interest and control.--*ib.* 73
6. Where the terms employed by the donor or testator, in a gift or bequest to an unmarried woman, are, that the property shall be "at her own disposal," or "for her sole and separate use," the property will vest absolutely in her as the owner, and it will be subject, upon marriage, to the marital rights of the husband.--*ib.*..... 73
7. Much stronger terms are required to indicate the intention of a donor or testator, to continue a distinct estate in an unmarried woman, after she shall come under the protection and control of the husband; than in the case of a gift or bequest to a married woman.--*ib.*..... 73
8. Where there is no indication of an intention, in the deed of gift of slaves, of a father to his son-in-law, in trust for his daughter, that she is to have the slaves at her own disposal, or for her own use, and as her separate property; and no terms to inhibit the husband from disposing of the slaves, against the consent of the wife,---the husband must be taken to have acquired an estate for the life of his wife in the slaves, untrammelled by any right of the wife to dispose of them; and the interposition of a trustee, or the fact of the daughter being married at the time of the gift, can make no difference.--*ib.* 73
9. And where a life estate only is vested in the daughter, with the fee to her children---the children, if there be any, may have recourse to a court of equity, even during the life of the mother, to prevent the removal of the slaves, so as to put in jeopardy their eventual interest.--*ib.*..... 74
10. A husband can only be charged by the contract or admission of his wife, in consequence of some authority actually given, or necessarily implied, from the circumstances under which she acts.--*Rochelle vs. Harrison.*..... 351
11. But the circumstances under which plaintiff's property went into possession of the intestate of a defendant administratrix, may be shewn, in detinue, by proving a request from defendant to plaintiff to that effect, in the lifetime of her husband.--*ib.*..... 351
12. When a *feme sole* plaintiff marries, pending a suit..the husband may make himself a party by motion; and

where a suggestion is made, that such a plaintiff has married, and a *scire facias* issues, calling upon the husband to show cause why he shall not be made a party... it is equivalent to a motion... *James vs. Tait et al.* 476

INDICTMENT.

1. A faro bank is within the words of the act of eighteen hundred and twenty-eight; and the words "gaming table," and "played with cards," in an indictment for keeping a faro bank, may be regarded as surplusage... *The State vs. Whitworth*..... 435
2. The statute provides, that it shall be sufficient for the indictment to charge that defendant *did keep and exhibit a gaming table, or bank for gaming*, without averring or proving that money was won or lost, or bet on such gaming table or bank.—*ib.* 435
3. The statute makes the value of property, maliciously injured or destroyed, the basis of the verdict under an indictment; and permits the jury to go to the extent of four fold its value; and the fine thus assessed is for the benefit of the injured party.—*The State vs. Garner*.... 447
4. An indictment, therefore, for maliciously injuring or destroying property, should contain an averment of the value of the property injured or destroyed.—*ib.*..... 447
5. Precision of description is unnecessary in an indictment—all that the law requires, is a description of the offence in the words of the statute creating it,—except where technical language is used... *The State vs. Briley*..... 472
6. Where an indictment charges an offender against a statute, with doing the unlawful act, with malice aforethought, and contains proper allegations of time and place, with a formal commencement and conclusion, it is sufficient.—*ib.*..... 472
7. After a conviction on one count of an indictment, a motion in arrest of judgment cannot prevail.—*ib.*..... 472
8. An individual to whom a slave is hired is, *pro hac vice*, the owner of the slave during the term for which he is hired, and may be described as such, in an indictment for stealing the slave; but the insertion of the true owner's name, in an indictment, will not render the proof irrelevant. The indictment may be supported, by proof of possession by the person hiring the slave.—*The State vs. Wisdom*..... 512
9. There is no repugnance in charging the ownership of

the slave in different persons, in different counts of the same indictment.—*ib.*..... 512

INJUNCTION.

1. After judgment, advantage cannot be taken of an entry on the record, that proceedings were stayed by injunction; and where the parties go to trial, afterwards, without objection, it will be presumed that the injunction was dissolved.—*James vs. Tait et al.*..... 476

INTEREST.

1. In debt on foreign judgment, plaintiff is entitled to damages, to the extent of the interest allowed, at the place where the judgment was obtained.—*Murray vs. Cone et al.*..... 250
2. But in such a case, in the absence of a plea, the case ought to be submitted to a jury, on an inquiry of damages; and the statute of the place of the contract, which ascertains the value of money, ought to be produced, or the usage proved.—*ib.*..... 250
3. Where one promised by a written contract, to pay money on the first day of January, eighteen hundred and thirty-six, with interest from eighteen hundred and thirty-five; it was held, that the intention of the contracting parties was, that interest was to be paid from the first day of January, eighteen hundred and thirty-five.—*Evans vs. Sanders.*..... 497

JUDICIAL PROCEEDING.

1. A decision on the probate of a will, is a judicial proceeding, and the court in which it is registered, is a court of record, and if the presiding judge is also clerk of the court, he has authority to test the records of his court in both capacities.—*Dozier vs. Joyce.*..... 303
2. All courts in the United States take judicial notice, that tribunals are established in the several states, for the adjudication of controversies, and the ascertainment of rights: *ib.*..... 303
3. The certificate and seal, which gives verity to the record, unless the record itself, discloses the want of jurisdiction, establishes as well the right of the court, to adjudicate the matter contained therein, as that such facts were adjudicated.—*ib.*..... 303

JUDGMENT.

1. Where judgment is not rendered on a demurrer to a plea—it will be presumed after judgment on an issue to the country, that the plea was waived—*Evans vs. Gordon*.. 142
2. The judgment of a court, when right, will not be disturbed because rendered for a wrong reason.—*ib*..... 142
3. Judgment for defendant on a plea in abatement, whether it be an issue in fact or in law, is, that the writ or bill be quashed,—and a *respondeas ouster* therefore, is not awarded.—*McCutchen, adm'r vs. McCutchen*..... 151
4. Where judgment is rendered *de bonis propriis*, when it should be *de bonis intestatis*—the supreme court will only reverse and render.—*Adm'r of Weatherford vs. Weatherford*..... 171
5. A judgment rendered at a term of a court unauthorised by law, is erroneous.—*ib*..... 171
6. In cases where bank debtors are proceeded against summarily by notice, the judgment, whether by default or otherwise, must shew affirmatively, every fact necessary to give the court jurisdiction; and in judgments by default, the liability of the defendant for the debt must be also shewn... *Curry vs. The Bank of Mobile*..... 361
7. But where an issue is made up, the verdict ascertains the defendant's liability, as in other cases... *ib*..... 361
8. Where a judgment is entered up for more than the amount due, a motion by a defendant for a new trial, will be refused, on condition that plaintiff remit the excess.—*Smith & March vs. Paul*..... 503
9. And, in such a case, if the clerk issue execution for more than the amount due on the judgment, the remedy is to supersede the execution.—*ib*..... 503

JUDGMENT, FOREIGN.

1. In debt on foreign judgment, plaintiff is entitled to damages, to the extent of the interest allowed, at the place where the judgment was obtained... *Murray vs. Cone, et al*..... 250
2. But in such a case, in the absence of a plea, the case ought to be submitted to a jury, on an enquiry of damages, and the statute of the place of the contract, which ascertains the value of money, ought to be produced, or the usage proved.—*ib*..... 250
3. After judgment, advantage cannot be taken of an entry on the record, that proceedings were stayed by injunction; and where the parties go to trial afterwards, with-

out objection—it will be presumed that the injunction was dissolved.—*James vs. Tait et al.*..... 476

JUSTICE OF THE PEACE.

1. On an appeal from the judgment of a justice of the peace, where the sum in controversy exceeds twenty dollars—a declaration, or statement of the cause of action is necessary... *Steelman vs. Owen*..... 562
2. And in such a case, when the sum is not ascertained, a jury must also be impaneled, to enquire of the damages... *ib.*..... 562

JURISDICTION.

1. As a general rule, consent of parties cannot give jurisdiction to a court, which otherwise does not possess it... *Merrill vs. Jones*..... 554

JURORS, GRAND.

1. The act of fourteenth January, eighteen hundred and twenty-six, (Aik. Dig. 298,) is repealed by the act of eighth January, eighteen hundred and thirty-six, (Aik. Dig. 2d ed. 624,) so far as the selection of grand jurors is provided for... *The State vs. Whitworth*..... 434
2. By the last mentioned act, it is made the duty of the clerk of the circuit court, and of the sheriff, under the superintendence of the judge of the county court, to select from the whole number of persons qualified to serve on juries, twenty-four persons, best qualified in their opinion, to serve on the grand jury.—*ib.*..... 434
3. Therefore, a plea in abatement, framed with reference to the former act, and pleaded to an indictment, for exhibiting a gaming table, found since the passage of the latter, is bad, on demurrer.—*ib.*..... 434

LANDS.

1. The rights of riparian proprietors depend upon the fact, whether the land is bounded by a river where the tide ebbs and flows, or whether it lies along a stream above tide water... *Hagan et al. vs. Campbell and Cleaveland*. 9
2. In the first case, the right of the owner to the soil, at common law, extends to high water mark, only.—*ib.*... 9
3. The shore below the common tide, belongs to the public: though by grant it may become vested in the citizen.—*ib.*..... 9
4. The rule, that a country bounded by a river, extends, to

- the point of low water, *it seems*, does not apply to the case of a grant by the public, to an individual.—*ib.*..... 9
5. At common law, the grantee of lands (from government,) bounded on tide water, is not allowed to extend his riparian rights beyond ordinary high water mark: such grants are construed favorably to the grantor, as a trustee for the public; and no alienation will be presumed, not clearly expressed.—*ib.*..... 9
6. Riparian proprietors are entitled to all accessions made to the lands granted, either by the retreating of the river from its former limits; or by the slow and secret deposit of sand, or other substances.—*ib.*..... 9
7. The beds of navigable streams, as well as the sea, are the property of the public: and if, by the instantaneous casting up of sand, or other substances, the water is thrown back, and an addition is made to the land—the public may claim the accession.—*ib.*..... 10
8. *Secus*, if the accession be slow and secret, when it becomes the property of the owner of the adjacent lands. ...*ib.*..... 10
9. Where the term “river,” is used in a grant, as a boundary—high, or low water mark must be intended—not a middle point.—*ib.*..... 10
10. A plat or plan of survey may be referred to in a grant, and become part of it; showing the proper lines, and ascertaining the locality.—*ib.*..... 10
11. Where a line is described in a grant, as running towards one of the cardinal points, it must run directly in the course, unless controlled by some object.—*ib.*..... 10
12. And, where the distance marked out in a plat, cannot be included, by allowing the lines to deviate, the grant which refers to the plat, must be construed to mean, that the lines shall be extended without a variation of course.—*ib.* 10
13. Ignorance of *fact* by a grantor, in regard to assertions in a grant, describing undeserved merit to the grantee, will not control the language of the grant, or limit its operation in favor of one, not claiming under a subsequent grant from the same source.—*ib.*..... 10
14. Where, in a grant of lands, bounded by a river, a free passage or road is reserved, such reservation does not prevent the freehold of all the lands embraced in the grant, from vesting in the grantee; or limit his riparian rights: the use of the road only is reserved.—*ib.*..... 10
15. *It seems*, that where accretion is made impracticable, without the authority of government, by the labor of a

- third person—excluding the water from its former limits, such third person is a trespasser, and can derive no profit from his labor: In such case, his labor inures to the benefit of the riparian proprietor... *ib.*..... 11
16. The grant made by the British Government, in seventeen hundred and sixty-seven, to William Richardson, of a certain tract of land in the district of Mobile, on the west side of the river Mobile, conferred on the grantee, in that grant, a title to high water mark, only.— *ib.*..... 11
17. But the confirmation of that grant to John Forbes & Co. in eighteen hundred and seven, conveyed to the grantee, *all* the lands lying east of the original tract, to the channel of the river.— *ib.*..... 11
18. And, to embrace *all* the intervening soil, the north and south lines of the original tract, . . held, properly to run, without variation of course, from high water mark to the margin of the channel. . . *ib.*..... 11
19. By these grants, and each of them, there was conferred upon the grantees, or their assignees, the right to the gradual increase of soil, by the receding of the river... *ib.* 11
20. Whether one who does not own lands, adjacent to a river, where the tide ebbs and flows, may, for the benefit of commerce, erect a wharf or other improvement, between high and low water mark, *quere.*— *ib.*..... 11
21. Though it is clear, no part of such erection can rest on the land of another person, nor can the latter be excluded from the use of the water, or be denied his riparian rights.— *ib.*..... 11
22. A verdict and judgment not specifying the lands, found illegally in a party's occupancy, with such certainty as will show where they lie, or the number of acres and extent of lines—will not be sustained.—*Sturdevant vs. The heirs of Murrell.* 317
23. By the terms of the act of congress of the tenth of May eighteen hundred, a forfeiture did not accrue *immediately* on the failure of a purchaser of lands, to pay within the period of time for which a delay of payment was given. The lands did not revert, until after they were *again* offered for sale in the manner specified in the act. *Rogers vs. Rawlings et al.* 325
24. The act of congress of the second of March, eighteen hundred and twenty-one, was a proposal to extend the term of payment many years, and required of the party accepting of the extension, to make a written declaration of his assent to the provisions of the act: one of

- which declared, that the land on which the further credit was taken, should be *ipso facto* forfeited to the United States, if the payments were not made within three months after the day appointed for the payment of the last instalment,—which became due on the thirtieth of September, eighteen hundred and twenty-eight.—*ib.* . . . 325
25. The act of assembly of this state of the fourteenth June, eighteen hundred and twenty-one, invested the executor or administrator of the decedent, with authority to claim the benefits of the act of congress, on behalf of the estates they represented.—*ib.* . . . 325
26. All the acts of congress for the relief of the purchasers of public lands, expired on the fourth of July, eighteen hundred and twenty-nine; and all lands sold on credit, and not paid for on the fourth of October, eighteen hundred and twenty-nine, on that day, reverted to the United States; and every interest of a purchaser, or derived from him, was at an end.—*ib.* . . . 325
27. A forfeiture under this, and similar acts, requires no act of entry on the part of the United States, to make it complete and effectual.—*ib.* . . . 325
28. The acts of congress of eighteen hundred and thirty, and eighteen hundred and thirty-one, do not revive the estates of purchasers, previously forfeited to the United States.—*ib.* . . . 325
29. The act of the thirty-first of March, eighteen hundred and thirty, gives a right of pre-emption of lands forfeited, to the purchasers, until the fourth of July, eighteen hundred and thirty-one, upon their paying the minimum price per acre, in addition to the amount theretofore paid thereon and forfeited; provided the price, including what had been paid, and the amount to be paid, should exceed three dollars and fifty cents per acre.—*ib.* . . . 326
30. And where one had paid more than three dollars and fifty cents per acre when the purchase was made, his heirs and assigns became entitled to a patent, without paying any more money.—*ib.* . . . 326
31. The act of the twenty-fifth of February, eighteen hundred and thirty-one, extended a similar benefit to the purchasers, their heirs or assigns, of all the forfeited lands which originally sold for less than fourteen dollars; if one dollar and twenty-five cents per acre had been, or should thereafter be paid.—*ib.* . . . 326
32. But the creditor of a purchaser, has no legal or equitable right, to insist on the gratuity bestowed in the act.—*ib.* . 326

33. A widow is not entitled to dower, of lands once purchased of the United States, but which have been subsequently forfeited.—*ib.*..... 326
34. Neither the common or statute law give to an executor *virtute officii*, a right to the possession of the testator's lands—if they are devised, they pass by the will to the devisee, who has a right to entry and possession; if undevised, they descend to the heir, who is entitled to possession... *Leavens vs. Butler, et ux.*..... 380
35. If the real estate is wanting to pay debts, the executor may obtain an order for the sale of so much as is necessary, and the right to sell, in such a case, is a naked power, and cannot be defeated by alienation or disseisin.—*ib.* 389
36. Where power is given by a will to sell lands, it does not require, in order to its validity, the co-operation of all the executors named—the power is attached to the office, and one executor, who has alone qualified, possesses all the power conferred by the will.—*ib.*..... 380
37. According to the English practice, where a will relates to lands only, it ought not to be proved in the spiritual court—but if it embraces personal property also, it ought to be proved there.—*ib.*..... 381
38. The county court has no jurisdiction over the lands of a testator, without the limits of this state.—*ib.*..... 381
39. A promise, under seal, to make a title in fee simple at some future time, to land—provided, the passage of an act of congress can be obtained to authorise such a conveyance; is properly rejected when offered as evidence, to establish title in a defendant in trespass.—*James vs. Tait et al.*..... 476
40. Trespass *quare clausum fregit*, will be to recover possession of lands, and a writ of possession is properly awarded to the successful plaintiff.—*ib.*..... 476
41. In trespass to try title, the plaintiff need only endorse on his writ, "that the action is brought as well to try titles, as to recover damages"—any unnecessary description of the premises, or of the injury committed, is regarded as surplusage.—*ib.*..... 476
42. Where the verdict responds to the issue, and judgment is rendered for the land described in the declaration—it is sufficient; and the use of the word "*tenement*," in addition to the description of the lands, does not vitiate the judgment.—*ib.*..... 476
43. An administrator is not required to exercise a control over the real estate of his intestate,—yet, if he assume to

lease it, he will hold the rent in trust for those legally entitled.—*Terry vs. Ferguson, adm'r*..... 500

LARCENY.

1. In larceny, the criminal intention constitutes the offence, and is the only criterion by which to distinguish a larceny from a trespass.—*The State vs. Hawkins*..... 461
2. To constitute larceny, it is not sufficient that the goods be taken for the purpose of destroying them; as, if one take the horse of another, for the purpose of destroying him, to injure his neighbor—and should destroy him—this would be malicious mischief, but not larceny.—*ib.*... 461
3. Where a defendant assisted in secreting a slave, to the end that she might escape from her master, and obtain her freedom, but there was no intention to convert the property to the use of the defendant—an indictment for larceny could not be sustained.—*ib.*..... 461
4. On an indictment for stealing a slave, evidence is not admissible, of conversations held by the prisoner, with other slaves, eighteen miles from the place where the offence is charged to have been committed... *The State vs. Wisdom*..... 511
5. Though the *fact*, that such prisoner was at a particular place, not far distant from the point where the crime was perpetrated, might be shewn, in order to trace him, step by step, to the place where the larceny was committed.—*ib.*... 511
6. But evidence of any act by the prisoner, or his general conduct, not connected with the crime, should not be received... *ib.*..... 511
7. Evidence offered by a prisoner, of his assertion of a claim to property stolen, when he was arrested cannot be received,—such a claim must be asserted before or at the taking, to enable the defendant to give evidence of his own declaration; and the *bona fides* of the assertion is for the consideration of the jury... *ib.*..... 511
8. The stealing of a slave cannot be established in any other or different manner, than the stealing of any other chattel endowed with volition, and the power of locomotion. Nor can an individual commit larceny in one county, who is, at the time of its commission, in another, and who is not near enough to assist those who are active in its perpetration.—*ib.*..... 512
9. An individual to whom a slave is hired is, *pro hac vice*, the owner of the slave during the term for which he is hired, and may be described as such, in an indictment for

- stealing the slave; but the insertion of the true owner's name, in an indictment, will not render the proof irrelevant. The indictment may be supported, by proof of possession by the person hiring the slave.—*ib.*..... 512
10. There is no repugnance in charging the ownership of the slave, in different persons, in different counts of the same indictment.—*ib.*..... 512

LEGACY.

1. Where a testator intends that the payment of legacies shall be expedited or delayed—his intention must be followed as nearly as possible.—*Leavens vs. Butler et ux.* . 380
2. Payment of debts takes precedence of legacies, and a legacy will not, in general, be paid, where the assets will be required to pay debts.—*ib.*..... 380
3. But, in case of a contingent debt, a legatee will be entitled to the assets, on giving security to refund,—if the debt become absolute.—*ib.*..... 380
4. Where it is obvious that it will be necessary for a legatee to refund, in order to pay debts; or where the will postpones the payment of the legacy to a distant time; or if the payment would defeat the testator's intention—the legatee cannot claim it.—*ib.*..... 381
5. A legatee may sue in equity for the recovery of his legacy; and if a settlement of the estate be necessary, all the parties whose rights are to be effected, or from whom a discovery is desired, may be brought before the court.—*ib.* 381
6. Courts of equity in England have concurrent jurisdiction with the spiritual courts, for the recovery of personal legacies, in all cases; and in some cases, the jurisdiction of chancery is exclusive.—*ib.*..... 381
7. A legatee cannot, in this State, in all cases, immediately after the expiration of eighteen months from the grant of letters testamentary, coerce a payment of his legacy.—*ib.* 381
8. The assent of an executor to a legacy, vests in the legatee the legal title,—the assent having relation to the will, the source of the legatee's title —*Mordecai vs. Beal.*... 529
9. But an executor cannot, by any act, under pretence of assent, enlarge or abridge the title of the legatee.—*ib.*... 529

LEX FORI.—(*See Contracts.*)

LEX LOCI.—(*See Contracts.*)

LIBERUM TENEMENTUM.

1. Matter admissible under a plea of *liberum tenementum*, may be given in evidence under the general issue.—*Dean vs. Fail*..... 491
2. The object of a plea of *liberum tenementum*, is usually to compel plaintiff to assign the place in which he alleges the trespass to have been committed, with greater precision.—*ib*..... 491

LIEN.

1. The lien of an execution does not depend upon contract, but is given by law, and imparts to the elder the right of satisfaction, in preference to one that has subsequently gone into the sheriff's hands.—*Bell et al. vs. King*..... 147
2. Yet this preference of an older over a younger execution creditor, does not excuse the sheriff from a levy of the latter execution, where the property is not needed to satisfy the former.—*ib*..... 147
3. A return of *nulla bona* cannot be justified by the proof of a prior lien, unless the executions creating it were actually levied.—*ib*..... 147
4. Notice of the existence of a lien, admitted by one who purchased at an administrator's sale, under the lien, cannot bind those who claim under the purchaser.—*Singleton vs. Gayle*..... 271
5. Nor does such notice admitted, supersede the necessity of proving the lien, when it is attempted to be enforced.—*ib*..... 271
6. Where one is charged, as administrator of an estate, a decree cannot be rendered against him as a purchaser, with notice of a lien in favor of a complainant, seeking to enforce the lien.—*ib*..... 271
7. No decree can be had against a purchaser without notice of a lien, unless his vendor, who was a purchaser with notice be made a party.—*ib*..... 271

LIMITATION, STATUTES OF.

1. Statutes, prescribing the time within which courts shall entertain certain actions, relate to the *remedy*, and a party seeking that *remedy*, must bring himself within the prescription, as limited by the *lex fori*.—*Goodman vs. Munks*..... 84
2. The *legal* obligation of a contract is discharged, whenever the statute of limitations of the place where it was made, has run against it; and nothing remains, but a moral duty, which courts of judicature cannot coerce.—*ib*..... 84

3. *It seems*, that if the *legal* right be gone, the contract is discharged, until it is re-affirmed, or in some manner recognised.—*ib.*..... 84
4. Prescription constituting a bar at the place of the contract, operates as a defence *extra territorium*.—*ib.*..... 84
5. Where one made a note in South Carolina, and remained in that state until the statute of limitations of South Carolina operated as a bar to a recovery on the note, it was held, that the bar created by the law of South Carolina, operated as an available defence to an action brought on the note, in this state...*ib.*..... 85
6. Whenever the subject matter of a trust can be sued for at law, the statute of limitations may be insisted on as a bar, although the remedy is pursued in a court of equity.—*Maur'y's adm'r vs. Mason's adm'r.*..... 211
7. The only trusts not within the operation of the statute, are those which are peculiarly and exclusively, the subjects of equity jurisdiction.—*ib.*..... 211
8. A subsisting recognised and acknowledged trust, as between the trustee and the *cestui que trust*, is not barred by the statute of limitation.—*ib.*..... 211
9. The fact that action can be maintained for money received on one of numerous demands, does not revive all previous causes of action, and the payment of one claim cannot be construed as an admission of another.—*ib.*.... 212
10. But if the trustee receives money on account of the subject matter of the trust, and does not separate it and keep it so that it can be identified, a continual conversion is constantly taking place, and if the *cestui que trust* lies by for more than six years, or such other time as will create a statutory bar, the presumption of payment will arise, as in any other case of a mere money demand, and the *onus* is thrown on the party claiming the money, to repel the presumption, as in other cases...*ib.*..... 212
11. It is now well settled, that if a defendant, by plea or answer, relies on the statute of limitations, as a defence—the plaintiff, if he wishes to bring his case within any of its exceptions, must amend his bill or file a special replication, so that the new matter introduced by him may be controverted or avoided by the opposing party...*ib.*.... 212
12. The same strictness in an answer to a bill in equity, where the statute of limitations is relied on as a defence, is not requisite, as in a plea.—*ib.*..... 213
13. Cases of bailment and unwritten contracts, when the contract is *expressed*, and the duties defined, are not open

- contracts in the view of the statute of limitations, and therefore, actions founded on them are not barred in three years.—*ib.*..... 213
14. Where a defendant in equity wishes to bring the case charged in complainant's bill, by evidence, to be one of open account, he must make the necessary allegations of facts, by his plea and answer.—*ib.*..... 213
15. The mere statement of an account before auditors, for the purpose of facilitating the examination of matters before them, is not a revival of a demand barred by statute.—*ib.* 213
16. Nor is the correction of an improper judgment, or a payment made on it, at the instance of a representative, an admission of other demands, as claims existing due and unpaid, by a defendant.—*ib.*..... 297

MALICIOUS MISCHIEF.

1. The statute makes the value of property, maliciously injured or destroyed, the basis of the verdict under an indictment; and permits the jury to go to the extent of four fold its value; and the fine thus assessed is for the benefit of the injured party.—*The State vs. Garner.*... 447
2. An indictment, therefore, for maliciously injuring or destroying property, should contain an averment of the value of the property injured or destroyed.—*ib.*..... 447
3. To constitute larceny, it is not sufficient that the goods be taken for the purpose of destroying them; as, if one take the horse of another, for the purpose of destroying him, to injure his neighbor—and should destroy him—this would be malicious mischief, but not larceny.—*The State vs. Hawkins.*..... 461

MARITAL RIGHTS.

1. Where property is given or bequeathed to a married woman without any qualification of the manner in which it is to be possessed or enjoyed, it vests, subject to the ordinary legal and marital rights of the husband.—*Lamb trustee, vs. Wragg and Stewart.*..... 73
2. The law favors the marital rights of the husband, and will not consider them to be interfered with, by any disposition of property, made for the wife's benefit, unless there is a clear exclusion of his interest and control.—*ib.* 73
3. Where the terms employed by the donor or testator, in a gift or bequest to an unmarried woman, are, that the property shall be "at her own disposal," or "for her sole and separate use," the property will vest absolutely in her as

the owner, and it will be subject, upon marriage, to the marital rights of the husband.--*ib.*..... 73

MAYHEM.

1. Where the act of eighteen hundred and seven, (Aik. Dig. 102,) speaks of disabling a limb or member, a permanent injury is contemplated, such as at common law, would constitute *mayhem*; a temporary disabling of a finger, an arm, or an eye, is not sufficient to constitute the statutory offence.--*The State vs. Briley*..... 472

MORTGAGE.

1. The representative of one who, at an administrator's sale, purchased, for an inadequate price, slaves, assumed to be subject to a mortgage which had lost its lien, is a necessary party to a bill filed by the mortgagee, seeking to foreclose the mortgage, to protect the interest of creditors; and without making such representative a party, no decree can be had in the cause.--*Singleton vs. Gayle*..... 270
2. An executor who has one of the slaves in possession, should also be made a party to the bill.-- *ib.*..... 270
3. A bill to foreclose a mortgage, where the record contains no proof of the execution of the bond and mortgage, will be dismissed.--*ib.*..... 270
4. Where the language of the master's report is such as to warrant the belief that the bond and mortgage had been produced before him and proved, it will be sufficient; but where the report does not warrant such a belief—the production and proof before him of the bond and mortgage will not be presumed.--*ib.*..... 270
5. A mortgage is regarded in equity, as a security for the debt, and when it becomes forfeited, the mortgagee may take proceedings to make the security available, if so authorised by the terms of the mortgage.--*ib.*..... 277
6. Where a party executes a mortgage for the security of several sums of money, to fall due at different times,—upon default in the payment of the debt which first falls due, the mortgage, *pro tanto*, becomes forfeited; and the mortgagee may proceed for a foreclosure and sale of the mortgaged premises.--*ib.*..... 277
7. Though the mortgagor may stop proceedings by paying or tendering what is due upon the mortgage.--*ib.*..... 277
8. Where a party executes a mortgage for the security of several sums of money, payable to the same person, and to fall due at different times, if on default, in the payment

- of the first sum, the mortgagee file his bill to foreclose the mortgage, and pending the suit the other debts fall due, it is competent to take an account of all the debts intended to be secured, and to decree a sale for their payment.—*ib.*..... 277
9. Where a bill for the foreclosure of a mortgage, and a sale of the mortgaged premises, has been pending, and the defendant served with *subpœna* for several terms, it is competent to refer the bill to a master, to take and report an account, to receive his report, and render a final decree in the case at the same term.—*ib.*..... 278
10. It is not necessary in a decree for the foreclosure of a mortgage and a sale of the mortgaged premises, to prescribe some future day, for the payment of what may be due upon the mortgage, before a foreclosure and sale.—*ib.*..... 278
11. The sheriff is competent to execute a decree for the sale of mortgaged premises, upon the foreclosure of the mortgagor's equity of redemption, and the decree need not require a return of the proceedings thereon to the court.—*ib.*..... 278

NAVIGABLE STREAM.

1. The rights of riparian proprietors depend upon the fact, whether the land is bounded by a river where the tide ebbs and flows, or whether it lies along a stream above tide water... *Hagan et al. vs. Campbell and Cleaveland.* 9
2. In the first case, the right of the owner to the soil, at common law, extends to high water mark, only.—*ib.*... 9
3. The shore below the common tide, belongs to the public: though by grant it may become vested in the citizen.—*ib.*..... 9
4. The rule, that a country bounded by a river, extends to the point of low water, *it seems*, does not apply to the case of a grant by the public, to an individual.—*ib.*... 9
5. At common law, the grantee of lands (from government,) bounded on tide water, is not allowed to extend his riparian rights beyond ordinary high water mark: such grants are construed favorably to the grantor, as a trustee for the public; and no alienation will be presumed, not clearly expressed.—*ib.*..... 9
6. Riparian proprietors are entitled to all accessions made to the lands granted, either by the retreating of the river from its former limits; or by the slow and secret deposit of sand, or other substances.—*ib.*..... 9

7. The beds of navigable streams, as well as the sea, are the property of the public : and if, by the instantaneous casting up of sand, or other substances, the water is thrown back, and an addition is made to the land—the public may claim the accession.—*ib* 10
8. *Secus*, if the accession be slow and secret, when it becomes the property of the owner of the adjacent lands. ...*ib* 10
9. Where the term "river," is used in a grant, as a boundary—high, or low water mark must be intended—not a middle point.—*ib*. 10
10. Where, in a grant of lands, bounded by a river, a free passage or road is reserved, such reservation does not prevent the freehold of all the lands embraced in the grant, from vesting in the grantee ; or limit his riparian rights : the use of the road only is reserved.—*ib*. 10
11. *It seems*, that where accretion is made impracticable, without the authority of government, by the labor of a third person—excluding the water from its former limits, such third person is a trespasser, and can derive no profit from his labor : In such case, his labor inures to the benefit of the riparian proprietor...*ib*. 10
12. Whether one who does not own lands, adjacent to a river, where the tide ebbs and flows, may, for the benefit of commerce, erect a wharf or other improvement, between high and low water mark, *quere*.—*ib*. 11
13. Though it is clear, no part of such erection can rest on the land of another person, nor can the latter be excluded from the use of the water, or be denied his riparian rights.—*ib*. 11

NEW TRIAL,

1. If the jury mistake the law, a motion to set aside the verdict, and for a new trial, is the remedy.—*Patterson et al. vs. Cook*. 66

NON SUIT.

1. The non-suits, (two of which equal a verdict,) embraced in the statute of eighteen hundred and seven, (Aik. Dig. 283, s. 135,) must be such as continue to the end of the term.—*Kennedy vs. Geddes & Co*. 263
2. Thus, two non-suits taken in a cause, at different terms, each of which is set aside before the end of the term, are not equal to a verdict.—*ib*. 263

NOTARY PUBLIC.

1. No authority is given by statute to a notary public, to certify a fact in regard to a bill of exchange, independent of the protest.—*Whitman & Hubbard vs. The Farmers' Bank of Chattahoochee*..... 258
2. The certificate of the notice by the notary, is *prima facie* evidence only of the fact recited; and if left at the wrong place, the fact may be controverted.—*Curry vs. The Bank of Mobile*..... 361

NOTE, PROMISSORY.

1. Where one obtains a note surreptitiously, and disposes of it to a party cognizant of the fact—such party cannot recover on the note... *McKenzie vs. McRae, adm'r*..... 70
2. Where one practises a cheat on another, in the transfer of a note, surreptitiously obtained, the party injured may recover back the consideration paid for the note.—*ib*..... 70
3. Where one made a note in South Carolina, and remained in that state, until the statute of limitations of South Carolina operated as a bar to a recovery on the note, it was held, that the bar created by the law of South Carolina, operated as an available defence to an action brought on the note in this state.—*Goodman vs. Munks*..... 85
4. The charter of the Planters' and Merchants' Bank of Mobile, does not give the right to the bank to recover on notes or bills held by them, unless such notes and bills are made negotiable and payable at that particular bank. *Lever vs. The Planters' and Merchants' Bank*..... 104
5. And in such cases the record must shew that the note or bill, on which the remedy is sought, was made payable and negotiable at the bank.—*ib*..... 104
6. The notice issued to defendant, and attached to the transcript, is not considered as part of the record,—so as to shew the right of the bank to recover judgment on motion.—*ib*..... 104
7. The act of the thirtieth June, eighteen hundred and thirty-seven, gives the remedy by motion, to the bank, only on notes and bills, the future acquisition of the banks.—*ib*..... 104
8. A legal title to a note payable to the order of the maker, can only be derived from his endorsement.—*Lea & Langdon vs. The Branch Bank at Mobile*..... 119
9. Such note is of no validity until endorsed; and until then, the maker cannot be sued.—*ib*..... 119

12. But when endorsed, the note becomes perfect, and the party may be treated as the maker.—*ib.*..... 119
13. And if a subsequent endorser be sued, the holder may derive title to the paper, through the endorsement of the maker.—*ib.*..... 119
14. The bank cannot, as endorsee of defendant, maintain a proceeding against one (not the maker) as the endorser of a note, made payable to the order of the maker.—*ib.*..... 119
15. Protest is not necessary to enable a plaintiff to maintain an action on a promissory note, or inland bill of exchange --and where an averment of protest is made, the fact being immaterial, is not necessary to be proved.—*Evans vs. Gord n.*..... 142
16. Evidence that the note sued on is not the property of plaintiff, may be given under the general issue.—*ib.*..... 142
17. The payee of a note made to him as administrator, may sue on the note in his own name, and so, also, the endorsee of a promissory note received by him as administrator, may maintain action on the note in his own name.—*ib.*..... 142
18. A demand of payment of a note made payable at a particular place, is not necessary to enable the holder to maintain action, though it may be matter of defence, for the defendant, if he was ready to pay at the time and place appointed.—*ib.*..... 142
19. The name of a plaintiff appearing endorsed on the back of a note, does not impair his right to recover.—*ib.*..... 142
20. By the law merchant, the endorser of a promissory note stipulates with the endorsee, and each subsequent holder, in the ordinary course of business, that if demand of payment is made by the maker at its maturity, and due notice of the non-payment given to him,—he, *himself*, will pay the note.—*Stephenson vs. Primrose.*..... 155
21. No precise form of notice is required,—it may be verbal or in writing.—*ib.*..... 155
22. And where the parties all reside in the same city, it is necessary, in order to fix the endorser's liability, that he be personally informed of the dishonor of the note, either verbally or in writing; or a notice should be left at his dwelling house or place of business.—*ib.*..... 155
23. Therefore, where the holder, within proper time after the dishonor of the note, leaves a verbal or written notice, at the endorser's counting-room, or place of doing business, but it is not shewn to have been left during *the hours of*

- business*, all the parties residing in the same city,—such notice would not be sufficient... *ib.*..... 155
24. But if the party entitled to notice, absent himself from his place of business *during the hours of business*, without leaving any one to attend to his interest,—the holder will be excused from giving notice *there*.—*ib.*..... 155
25. But if the endorser has used the precaution to obtain an assignment of all the effects of the drawer or maker, to be applied to the payment of the paper endorsed, he cannot claim an exemption from liability, because he has not had regular notice of the dishonor of the bill or note.—*ib.*... 155
26. So, if he has protected himself, by taking collateral security, *sufficient* to cover the endorsement, he impliedly waives his legal right to notice.—*ib.*..... 155
27. Though to this rule there might be an exception... *ib.*.. 155
28. A room to which a man is accustomed to resort, but in which it is not shewn, that he carries on any regular trade or employment, cannot be considered his *place of business*.—*ib.*..... 156
29. And if the holder of paper call at a room thus resorted to, for the purpose of giving notice to its occupant of the dishonor of a note endorsed by him, at a time when he is absent—the holder is not excused from giving notice:—especially where the endorser has a dwelling house and livery stables within the same city, the latter of which he personally superintends.—*ib.*..... 156
30. The statute of this state does not destroy the distinction which the law merchant recognises, between foreign and inland bills of exchange, and promissory notes; nor does it make the same rules applicable to their securities.—*Quigley adm'r vs. Primrose.*..... 247
31. The terms of the statute are, that the law merchant applicable to each several class shall prevail, instead of the provisions previously in force in this state, with relation to assignable securities.—*ib.*..... 247
32. No protest is necessary to fix the liability of the endorser of a promissory note—a demand of payment, at the time and place provided for it, with notice of such demand to the endorser, is all that the law requires.—*ib.*.. 247
33. A plaintiff is not held, in an action against an endorser, to strict proof of the time or place of demand of payment of a promissory note, when laid under a *scilicet*, and, in most cases, may make his proof conform to the legal effect of his declaration.—*ib.*..... 247
34. Where one signs his name to a blank piece of paper,

- with intent that it shall be filled up, as a note or endorsement, he is liable on the same, although the person entrusted with it, shall violate the confidence reposed in him, by filling it up with another sum, or using it for another purpose, than the one intended.—*Roberts vs. Adams*.... 297
35. Such a blank is a letter of credit, to any amount which the person to whom the same is confided, may choose to insert in it.—*ib.*..... 297
36. And if such a blank be obtained by a firm, when in existence, and be filled up by one of the partners, after its dissolution, each partner will be liable to reimburse the moneys paid by the signer or indorser in blank to the holder.—*ib.*..... 297
37. Where one lends his name on an instrument in blank, to partners, as their security, and by the negligence of one partner, and the fraud of the other, the lender is compelled to pay the sum inserted in the blank instrument—he is entitled to reimbursement from either of the partners.
ib...... 297
38. *It seems*, however, that if a blank be entrusted to one for the purpose of inserting a limited sum in it, or to be used for a particular purpose, and it be filled up with a larger sum, or used for a different purpose, than that contemplated by the signer or endorser of the blank, and the facts be traced to the knowledge of plaintiff, at the time he acquires possession of the instrument, it will prevent a recovery.—*ib.*..... 297
39. Notes payable in bank, are governed by the law merchant.—*Evans vs. Gordon*..... 346
40. And on such paper, it is not necessary to sue the maker to insolvency, in order to enable the holder to maintain a suit against the endorser—*aliter*, where the note is not payable in bank.—*ib.*..... 346
41. Where the consideration of the note, is effects, which belonged to an estate of which the plaintiff is executor, the contract is considered as made with the *individual*, and he need not declare in his *representative* character in a suit on the contract.—*ib.*..... 346
42. Where a negotiable note is endorsed immediately to a plaintiff, suit may be brought by him on such endorsement against the endorser, without disclosing that he received it as an executor.—*ib.*..... 346
43. Where the name of one of the endorsers is similar to that of the maker, a presumption that the same person is both maker and endorser is not so violent, as to amount to

- prima facie* evidence of the fact. If they were the signatures of the same person, the fact might be easily proved.—*Curry vs. The Bank of Mobile*. 360
44. *It seems*, that where the protest of a note states, that payment of the note was demanded at the proper time and at the proper place, and that it was protested for non-payment—it is sufficient, without stating from whom payment is demanded, or what reply was given to the demand made.—*ib*. 360
45. Where the protest states, "that the endorsers have had due notice of the demand and non-payment, and protest of said note, by notice in writing, directed by me, as follows: To the endorsers," and left at their offices—it is sufficient; and an objection, that the place where the notice was left, is not described, and that the notary decides that the place is the office of the endorser, will not be sustained.—*ib*. 360
46. Notice of the dishonor of a note may be given on the same day the protest is made, and must be given on the next day, or placed in the post office, to be sent by the next mail.—*ib*. 360
47. The holder of a note or bill of exchange cannot be permitted, by any act of his, to prejudice the right of any party to the instrument, to whom he looks for payment.—*ib*. 361
48. The deliberate cancellation by the holder, of an endorsement on a note, discharges the liability of such endorser, to the holder; and so operating, it will also discharge from liability to the holder, the subsequent endorser.—*ib*. 361
49. Thus, the holder of a note or bill of exchange, seeking to effect a recovery on such note, against an endorser, cannot prejudice the right of such endorser, by striking out the name of a previous endorser, who would be liable to the last.—*ib*. 361
50. Though, *it seems*, the situation of the endorser, whose name is stricken out, might be explained—as, that he was an accommodation endorser, and not responsible to his immediate endorsee, in any event.—*ib*. 361
51. The inference usually expressed in a declaration on a promissory note, "by means whereof," &c. is supplied by a statement of a promise to pay the note, according to its tenor and effect.—*Adams et al. vs. McMillian*. 445
52. The omission to insert an allegation, that defendant is li-

- able to pay the note, is not a matter of substance, to be reached by general demurrer, or on error.—*ib.*..... 445
53. A promissory note is *in itself*, a legal liability, and needs no distinct substantive allegation in the declaration, to entitle a plaintiff to recover, apart from a description of the note, and an allegation of non-payment.—*ib.*..... 445
54. A plea to an action by the assignee of a note, that the note has never been assigned, and is still the property of the payee, must be verified by the oath of the defendant, swearing that he verily believes the assignment to be forged—and until this is done, plaintiff need not prove the assignment.—*Beal & Bennett vs. Suedicor*..... 523

PAPERS, LOSS OF.

1. Every court of justice, of necessity has the power, whilst the papers of a cause are *in fieri*, to supply a loss occasioned either by accident or design.—*Dozier vs. Joyce*..... 303

PARTNERS.

1. To justify a discontinuance, against one who is sued as a partner, and on whom the process has been served, it should appear that he is not a member of the firm.—*Gazzam et al. vs. Beebe & Co.*..... 49
2. Where one of several defendants, sued as partners, pleads in abatement, and the jury find the issue for the plaintiffs, and judgment is rendered by the court, for the amount of the plaintiffs' claim, the defendants cannot object in error, on the rendition of judgment against all, on the issue formed upon the plea, the jury having found no damages.—*Hobson & sons vs. Emanuel et al.*..... 442
3. Where defendants are described, as "late merchants, partners, &c." it is to be inferred, that the co-partnership ceased to exist, before the commencement of the suit.—*Beal & Bennett vs. Suedicor*..... 523
4. And where a partnership has ended, service of process upon one of the partners, cannot operate as a service upon the other members of the firm.—*ib.*..... 523
5. But where both defendants appear, and judgment is rendered against them, advantage cannot be taken of the irregularity of the service.—*ib.*..... 523
6. The general issue in assumpsit, may be pleaded by one of several defendants, in an action against defendants, who were at a former time partners.—*ib.*..... 523

PENALTY.

1. A statute imposing a penalty, must be strictly construed, and closely followed, and the form of procedure, and the measure or description of proof prescribed, must be regarded.--*Bettis, adm'r vs. Taylor*..... 564

PERSONAL CHATTEL.

1. Personal property is divided into things in *possession* or in *action*, and property in things in possession, is either *absolute* or *relative*.--*Magee vs. Toland*..... 36
2. Neither the bailor or bailee of a personal chattel has an absolute property in the chattel. The property in both is qualified, and each of them is entitled to his action, if the goods be damaged or taken away. The bailee, on account of his possession, and the bailor, because the possession of the bailee is immediately his possession.--*ib*... 36
3. The actual enjoyment of a chattel which accrues to the wife, before marriage, is not necessary to vest her interest in the husband...*ib*..... 36
4. If a chattel be found, and not converted to the use of the finder; or if it be hired, or loaned, or otherwise bailed; it does not thereby become a chose in action; and if it belong to a woman, who marries, her right immediately vests in the husband, at least so far, that if she dies, it will survive to him.--*ib*..... 36
5. The seller of personal chattels impliedly stipulates that the article sold is his own, and that he will indemnify the buyer for the loss, if the title is in another person.--*Ricks, adm'r vs. Dillahunty*..... 133
6. But a sale by an executor, administrator, or other trustee, forms an exception to the rule, and does not imply a warranty of title, unless there be fraud, or perhaps, in some instances, gross negligence.--*ib*..... 133
7. To entitle the purchaser to recover for any defect in the quality or soundness of the article or property sold, except under special circumstances, he must prove that the seller warranted the thing sold to be good and sound, or that he concealed or fraudulently represented its qualities.--*ib*. 133
8. If the warranty be express, it will extend to all defects, whether known or unknown, to the seller, unless they be such as a common purchaser might have observed, at the time of the sale.--*ib*..... 133
9. No particular form of expression is required to constitute a warranty. It generally depends upon the terms, and the sense in which they are understood by the parties,

- whether they amount to a warranty, or were a mere expression of the seller's opinion.—*ib.*..... 133
10. The purchaser of personal property cannot defend against the purchase money, by showing that the property was of no value,—the seller making no warranty, and practising no fraud.—*ib.*..... 134
11. A suppression of the truth, a'so, to the buyer's prejudice, will render the seller liable.—*ib.*..... 134
12. A contract for the sale or hire of a slave, is governed as far as the nature of the subject will allow, by the same principles that govern other contracts of sale.—*ib.*..... 134
13. The hirer of a slave for a *definite period*, becomes a purchaser, for the *time agreed on*, and if the slave die before its expiration, the loss must be borne by the hirer, and he cannot resist a recovery, by shewing that the act of God prevented him from deriving a profit from the contract, unless, by its terms, it provides for such a contingency.—*ib.*..... 134
14. It seems, however, that in Virginia and South Carolina, the owner is not entitled to recover hire, for the time intervening between the death of the slave, and the expiration of the term for which he was hired, but the hire must be apportioned.—*ib.*..... 134
15. In South Carolina, a sound price, contrary to the English common law, implies a warranty of soundness, by the seller of a personal chattel....*ib.*..... 134
16. The wrongful taking or detention of a personal chattel or other illegal assumption of ownership, or using or misusing of it amount to a conversion.—*Gray vs. Croche-ron.*..... 191
17. So, a temporary conversion will make a defendant liable, as, if one ride a horse, or control the services of another's slave, though he afterwards restore them to the true owner—the cause of action, which was once perfect, still remains, and the restoration will only go in mitigation of damages.—*ib.*..... 191
18. If a slave be lost, during the time he is employed by a defendant, without the owner's consent, defendant is liable in trover, to the full value of the slave.—*ib.*..... 191
19. But if the employment be at an end when the slave is lost, defendant will only be liable for the temporary conversion, and the measure of damages, instead of being the value of the slave, will be the injury resulting to the plaintiff, from the employment, which under some circumstances, may possibly be increased.—*ib.*..... 191

20. A contract for the sale of negroes, which is *executory*, and which is intended to defraud creditors, does not pass the title: and an action brought on the contract, by the vendee against the vendor, for the slaves, cannot be maintained.—*Rochelle vs. Harrison*..... 351
21. A deed is not necessary in a conveyance of personal estate; a delivery passes title, as effectually as the most solemn instrument.—*ib.*..... 351
22. And such a delivery of a personal chattel, in derogation of the rights of creditors, is within the inhibition of the statute.—*ib.*..... 351
23. Delivery of possession is an essential ingredient, in a gift of personal property, but a *change of possession* is not indispensable.—*Sims vs. The adm'r of Sims*..... 449
24. Every delivery of a chattel, with intent to give it to another, operates a *legal* change of possession, and transfers dominion over the subject of the gift, to the donee.—*ib.* 449
25. The fact that a slave, given by a parent to a child, remains at the residence of the donor, may be explained by the circumstance, that the residence of the donor, is also that of the donee.—*ib.*..... 449
26. And is a proper subject for the consideration of a jury, when enquiring into the truth and reality of the gift.—*ib.* 449

PHYSICIAN.

1. Saying of a physician, "he has killed the child by giving it too much calomel," is actionable.—*Johnson vs. Robertson*..... 486

PLEADING.

1. A plea in abatement at the second term, which is rejected as coming in too late, is no appearance to the writ.—*Jordan vs. Bell*..... 53
2. A defect in a writ must be taken advantage of, by plea in abatement.—*ib.*..... 53
3. Evidence that the note sued on is not the property of plaintiff, may be given under the general issue.—*Evans vs. Gordon*..... 142
4. Where judgment is not rendered on a demurrer to a plea—it will be presumed after judgment on an issue to the country, that the plea was waived.—*ib.*..... 142
5. Objections raised to the time of filing a plea in abatement, founded on the rules of court, must be made in the court below, and cannot be entertained in the Supreme court. *McCutchen, adm'r vs. McCutchen*..... 151

6. Judgment for defendant on a plea in abatement, whether it be an issue in fact or in law, is, that the writ or bill be quashed,—and a *respondens ouster* therefore, is not awarded.—*ib.*..... 151
7. After judgment of *respondens ouster*, upon a demurrer to a plea in abatement,—no other plea in abatement can be allowed.—*Hovek vs. Scott.*..... 169
8. A plaintiff is not held, in an action against an endorser, to strict proof of the time or place of demand of payment of a promissory note, when laid under a *scilicet*, and, in most cases may make his proof conform to the legal effect of his declaration.—*Quigley, adm'r vs. Primrose.*.. 247
9. The declaration, in trespass to try title, should describe the land in controversy, with so much particularity and precision, as will inform the defendant what he is to defend against, and the court for what it is to render judgment.—*Sturtevant vs. The Heirs of Murrell.*..... 317
10. Where one plea is “not guilty” to an action of trespass to try title, he is forbidden from availing himself of an objection to the declaration; but may, in error, insist upon the insufficiency of the verdict and judgment.—*ib.*.... 317
11. To authorise a party to recover upon a count in the declaration, alleging a special contract, it is necessary to shew a contract substantially as alleged.—*Hitchcock et al. vs. Loken & Son.*..... 333
12. But it is competent for a plaintiff, where no special contract is proved, if he have a good cause of action, to recover either in a general *in debitas assumpsit, quantum meruit*, or *quantum valebat*, as the proof may warrant.—*ib.*..... 333
13. At common law, when administration was revoked, pending a suit, the revocation might be pleaded in discharge of the action, but it was necessary for the plea to allege an administration of the effects, or that they had been delivered to the succeeding administrator.—*Driver vs. Riddle.*..... 343
14. The inference usually expressed in a declaration on a promissory note, “by means whereof,” &c. is supplied by a statement of a promise to pay the note, according to its tenor and effect.—*Adams et al. vs. McMillan.*..... 445
15. The omission to insert an allegation, that defendant is liable to pay the note, is not a matter of substance, to be reached by general demurrer, or on error.—*ib.*..... 445
16. A promissory note is *in itself*, a legal liability, and needs no distinct substantive allegation in the declaration, to en-

- title a plaintiff to recover, apart from a description of the note, and an allegation of non-payment.—*ib.*..... 445
17. A plea in abatement that a suit was pending for the identical cause of action, at the time of the issuance of the writ, is supported by the production of the record; and the replication to such a plea, should present the issue of *nul tiel record*.—*Gaston vs. Parsons*..... 469
18. A writ, as part of the record, is proper and pertinent evidence to support such a plea, on an issue of *nul tiel record*.—*ib.*..... 469
19. A defendant is entitled to judgment of *non pros*, where no replication is filed to his plea in abatement.—*ib.*..... 469
20. And a failure, on his part to move for judgment of *non pros*, does not authorise the rendition of judgment against him.—*ib.*..... 469
21. Objections to a declaration cannot be received after a plea of not guilty...*James vs. Tait et al.*..... 476
22. Nor can an objection to the endorsement on the writ, be entertained after the plea of not guilty.—*ib.*..... 476
23. In trespass to try title, the plaintiff need only endorse on his writ, "that the action is brought as well to try titles, as to recover damages"—any unnecessary description of the premises, or of the injury committed, is regarded as surplusage.—*ib.*..... 476
24. Where words are actionable in themselves, it is not necessary to lay special damages, and no evidence of special damage can be received, unless specially averred.—*Johnson vs. Robertson & wife*..... 486
25. An averment, that certain persons, who are named, "*and divers other persons* would otherwise have employed the plaintiff," is not sufficient to authorise proof of special damages, by others than those specially named.—*ib.*.... 486
26. Matter admissible under a plea of *liberum tenementum*, may be given in evidence under the general issue.—*Dean vs. Fail*..... 491
27. The object of a plea of *liberum tenementum*, is usually to compel plaintiff to assign the place in which he alleges the trespass to have been committed, with greater precision.—*ib.*..... 491
28. A declaration against defendant, as drawer of a bill, which does not allege presentment for payment, and notice of refusal, is not a defect available in error.—*Smith & March vs. Paul*..... 503
29. Where defendants are described, as "late merchants, partners, &c." it is to be inferred, that the co-partnership ceas-

- ed to exist, before the commencement of the suit.--*Beal & Bennett vs. Snedcor*..... 523
30. The general issue in assumpsit, may be pleaded by one of several defendants, in an action against defendants, who were at a former time partners.--*ib.*..... 523
31. A plea to an action by the assignee of a note, that the note has never been assigned, and is still the property of the payee, must be verified by the oath of the defendant, swearing that he verily believes the assignment to be forged--and until this is done, plaintiff need not prove the assignment.--*ib.*..... 523
32. Where an attachment issues on affidavit of a money demand, a declaration subsequently filed in trover, against a defendant who does not appear, cannot be allowed.--*Marshall & McLeod vs. White*..... 551
33. But if defendant appear and plead to the merits, he will be too late to review the irregularity after judgment.--*ib.*..... 551
34. On an appeal from the judgment of a justice of the peace, where the sum in controversy exceeds twenty dollars—a declaration, or statement of the cause of action is necessary... *Steelman vs. Owen*..... 562

POSSESSION.

1. Personal property is divided into things in *possession* or in *action*, and property in things in possession, is either *absolute* or *relative*.--*Magee vs. Toland*..... 36
2. A bailment is a qualified, limited or special property, in a thing capable of absolute ownership.--*ib.*..... 36
3. Neither the bailor or bailee of a personal chattel has an absolute property in the chattel. The property in both is qualified, and each of them is entitled to his action, if the goods be damaged or taken away. The bailee, on account of his possession, and the bailor, because the possession of the bailee is immediately his possession.--*ib.*... 36
4. Possession of lands by a guardian in *socage*, is the possession of the ward: The possession of a bailee is the possession of the bailor, and the possession of a guardian is also possession of the ward.--*ib.*..... 36
5. The possession of the guardian of an infant female ward, is the possession of the ward; and if the ward marry, the possession *eo instanti*, is transferred to the husband, and the chattel is then in possession of the husband, in point of law, as much as it could afterwards be, by an actual *manucaption*.--*ib.*..... 36

6. The right of an administrator to the possession of the personal property of his intestate is not barred by an injunction forbidding its distribution.--*McCutchen, adm'r vs. McCutchen*..... 151
7. The maxim of the law, that the right to personal property, draws to it the possession, is true only, when the possession by another, is consistent with the possession of the owner--as in the case of a bailment.--*Gordrign vs. Lloyd*. 237
8. But where the possession of the property assigned, is held by another, adversely, and under a color of title, and the owner would be driven to an action to recover his possession--it is a mere chose in action and the transferee cannot maintain action in his own name.--*ib.*..... 237
9. Delivery of possession is an essential ingredient, in a gift of personal property, but a *change of possession* is not indispensable.--*Sims vs. The heirs of Sims*..... 449
10. Every delivery of a chattel, with intent to give it to another, operates a *legal* change of possession, and transfers dominion over the subject of the gift, to the donee.--*ib.* 449
11. The fact that a slave, given by a parent to a child, remains at the residence of the donor, may be explained by the circumstance, that the residence of the donor, is also that of the donee.--*ib.*..... 449
12. And is a proper subject for the consideration of a jury, when enquiring into the truth and reality of the gift.--*ib.* 449

PROCESS.

1. Process must be construed in reference to the law which provides for its issuance and return.--*Findley et al. vs. Ritchie*..... 452
2. Where a defendant appears in court by an attorney, it is immaterial whether the process was served or not: an objection arising from a defective service of process, is waived by a *general appearance*.--*Moore vs. Phillips*. 467
3. Where the record discloses, that the parties came by their attorneys, and judgment by default was taken, not because of defendant's non-appearance, but for an omission to plead, an objection that defendant was not legally served with process, will be unavailable.--*ib.*..... 467
4. Where a partnership has ended, service of process upon one of the partners, cannot operate as a service upon the other members of the firm.--*Deal & Bennet vs. Snedcor* 523
5. But where both defendants appear, and judgment is ren-

dered against them, advantage cannot be taken of the irregularity of the service.—*ib.*..... 523

PROMISE.

1. A promise, under seal, to make a title in fee simple at some future time, to land—provided, the passage of an act of congress can be obtained to authorise such a conveyance; is properly rejected when offered as evidence, to establish title in a defendant in trespass.—*James vs. Tait et al.*..... 476

PROPERTY, SEIZURE OF, FOR PUBLIC USES.

1. A citizen does not lose the right to reclaim property taken from him, in times of public emergence, when the necessity which induced its seizure has passed away.—*Fryer vs. McRae*..... 187
2. And until his consent to part with it is freely given, he is to be considered its rightful owner, until time shall have divested his right of property.—*ib.*..... 187
3. Therefore, where a horse had been seized under pretence of necessity for the public service, and was refused to be delivered on demand made, after the exigence which induced the seizure had passed—it was held that trover would lie for his recovery.—*ib.*..... 187

PROTEST.

1. Protest is not necessary to enable a plaintiff to maintain an action on a promissory note, or inland bill of exchange --and where an averment of protest is made, the fact being immaterial, is not necessary to be proved.—*Evans vs. Gordon*..... 142
2. No protest is necessary to fix the liability of the endorser of a promissory note—a demand of payment, at the time and place provided for it, with notice of such demand to the endorser, is all that the law requires.—*Quigley, adm'r vs. Primrose*..... 247
3. *It seems*, that where the protest of a note states, that payment of the note was demanded at the proper time and at the proper place, and that it was protested for non-payment—it is sufficient, without stating from whom payment was demanded, or what reply was given to the demand made.—*Curry vs. The Bank of Mobile*..... 360
4. Where the protest states, "that the endorsers have had due notice of the demand and non-payment, and protest of said note, by notice in writing, directed by me, as fol-

- lows: To the endorsers," and left at their offices—it is sufficient; and an objection, that the place where the notice was left, is not described, and that the notary decides that the place is the office of the endorser, will not be sustained.—*ib.*..... 360
5. Notice of the dishonor of a note may be given on the same day the protest is made, and must be given on the next day, or placed in the post office, to be sent by the next mail.—*ib.*..... 360
6. Where a notice is sent by mail to a distant post office, the place to which the letter containing the notice is directed, must be stated in the certificate of the notary.—*ib.* 360

RECORD.

1. A decision on the probate of a will, is a judicial proceeding, and the court in which it is registered, is a court of record, and if the presiding judge is also clerk of the court, he has authority to test the records of his court in both capacities.—*Dozier vs. Joyce.*..... 303
2. The certificate and seal which gives verity to the record, unless the record itself, discloses the want of jurisdiction, establishes as well the right of the court, to adjudicate the matter contained therein, as that such facts were adjudicated.—*ib.*..... 303
3. The records of a court of limited jurisdiction, should discover every fact essential to the validity of its sentences. *Lister vs. Vivian et al.*..... 375

REMEDY.

1. Remedies for the enforcement of contracts, or to obtain compensation for a breach, are to be regulated and pursued according to the *lex fori*, and not the law of the place where they are made or are to be executed.—*Goodman vs. Munks.*..... 84
2. Statutes, prescribing the time within which courts shall entertain certain actions, relate to the *remedy*, and a party seeking that *remedy*, must bring himself within the prescription, as limited by the *lex fori*.—*ib.*..... 84

RIGHT OF PROPERTY, TRIAL OF.

1. In a proceeding to try the right of property levied on under an attachment, the court cannot reject an execution, (or it would seem, the attachment,) offered in evidence, on the ground that the lien of the attachment was de-

- stroyed by the giving of a replevy bond.--*Perine et al vs. Babcock*..... 131
2. The act which confers the right on a jury to impose damages for vexatiously, (or for delay,) claiming property, levied on under execution, (Aik. Dig. 168,) no where requires that the jury, in giving damages, shall express by their verdict, the causes which influenced them.--*Bettis adm'r. vs. Taylor*..... 564
3. Thus, an administrator, who, as such, interposes a claim to property levied on by execution, will be liable, individually, for the forthcoming of the property, even if destroyed, or if it dies, after the claim is interposed, and the property goes into his possession.--*ib.*..... 564
4. *It seems*, that one, interposing such claim, as administrator, while incurring, by the stipulations of his own bond, personal responsibility,--might make good the issue on his part, by showing title in his intestate.--*ib.*..... 565
5. Where an administrator, in such case, is forced to expend money, to protect the estate of his intestate, the court that settles his accounts can do him justice.--*ib.*..... 565
6. Where one, voluntarily, with the leave of court, and the consent of a plaintiff in execution, substitutes himself in the place of another, as a claimant, in a proceeding to try the right of property--he cannot afterwards be allowed to object that all this was irregular.--*ib.*..... 565
7. In order to comply with the law, authorising executions to be forwarded to other counties, (Aik. Dig. 170,) the sheriff must deposit a copy of the execution in the clerk's office, of the county to which it is sent, and must endorse on it, a copy of the return made by him to the original--and unless this is done, the copy would not, *in itself*, be evidence on a trial of the right of property, in the goods levied on.--*ib.*..... 565
8. But the act is merely affirmative, and does not exclude every other mode of proving a copy of the execution.--An examined, or sworn copy, is admissible.--*ib.*..... 565
9. *Aliter*, where the issue is *nul tiel record*, in which case the record must be produced, *sub pede sigilli*, or otherwise made authentic, in itself.--*ib.*..... 565
10. In a trial of the right of property, the plaintiff in execution need not produce the judgment, on which the execution issued--nor can the claimant be allowed to litigate its regularity or justice, or show that the defendant in execution was dead when it issued.--*ib.*..... 565

RIPARIAN RIGHTS.

1. The rights of riparian proprietors depend upon the fact, whether the land is bounded by a river where the tide ebbs and flows, or whether it lies along a stream above tide water... *Hagm et al. vs. Campbell and Cleaveland.* 9
2. In the first case, the right of the owner to the soil, at common law, extends to high water mark, only.—*ib.*... 9
3. The shore below the common tide, belongs to the public: though by grant it may become vested in the citizen.—*ib.*..... 9
4. The rule, that a country bounded by a river, extends to the point of low water, *it seems*, does not apply to the case of a grant by the public, to an individual.—*ib.*.... 9
5. At common law, the grantee of lands (from government,) bounded on tide water, is not allowed to extend his riparian rights beyond ordinary high water mark: such grants are construed favorably to the grantor, as a trustee for the public; and no alienation will be presumed, not clearly expressed.—*ib.*..... 9
6. Riparian proprietors are entitled to all accessions made to the lands granted, either by the retreating of the river from its former limits; or by the slow and secret deposit of sand, or other substances.—*ib.*..... 9
7. The beds of navigable streams, as well as the sea, are the property of the public: and if, by the instantaneous casting up of sand, or other substances, the water is thrown back, and an addition is made to the land—the public may claim the accession.—*ib.*..... 10
8. *Secus*, if the accession be slow and secret, when it becomes the property of the owner of the adjacent lands. ...*ib.*..... 10
9. Where the term "river," is used in a grant, as a boundary—high, or low water mark must be intended—not a middle point.—*ib.*..... 10
10. Where, in a grant of lands, bounded by a river, a free passage or road is reserved, such reservation does not prevent the freehold of all the lands embraced in the grant, from vesting in the grantee; or limit his riparian rights: the *use* of the road only is reserved.—*ib.*..... 10
11. *It seems*, that where accretion is made impracticable, without the authority of government, by the labor of a third person—excluding the water from its former limits, such third person is a trespasser, and can derive no profit from his labor: In such case, his labor inures to the benefit of the riparian proprietor...*ib.*..... 10

12. The grant made by the British Government, in seventeen hundred and sixty-seven, to William Richardson, of a certain tract of land in the district of Mobile, on the west side of the river Mobile, conferred on the grantee, in that grant, a title to high water mark, only.—*ib.*..... 11
13. But the confirmation of that grant to John Forbes & Co. in eighteen hundred and seven, conveyed to the grantee, *all* the lands lying east of the original tract, to the channel of the river.—*ib.*..... 11
14. And, to embrace *all* the intervening soil, the north and south lines of the original tract, . . held, properly to run, without variation of course, from high water mark to the margin of the channel. . . *ib.*..... 11
15. By these grants, and each of them, there was conferred upon the grantees, or their assignees, the right to the gradual increase of soil, by the receding of the river. . . *ib.* 11
16. Whether one who does not own lands, adjacent to a river, where the tide ebbs and flows, may, for the benefit of commerce, erect a wharf or other improvement, between high and low water mark, *quere.*—*ib.*..... 11
17. Though it is clear, no part of such erection can rest on the land of another person, nor can the latter be excluded from the use of the water, or be denied his riparian rights.—*ib.*..... 11

RIVER

1. Where the term "river," is used in a grant, as a boundary—high, or low water mark must be intended—not a middle point.—*Hagan et al. vs. Campbell and Cleave-land.*..... 10

SHERIFF.

1. If a defendant in execution have property in the county, it is the sheriff's duty to levy upon it, unless it be exempted from seizure, by law.—*Bell et al. vs. King.*..... 147
2. The lien of an execution does not depend upon contract, but is given by law, and imparts to the elder the right of satisfaction, in preference to one that has subsequently gone into the sheriff's hands.—*ib.*..... 147
3. Yet this preference of an older over a younger execution creditor, does not excuse the sheriff from a levy of the latter execution, where the property is not needed to satisfy the former.—*ib.*..... 147
4. A return of *nulla bona* cannot be justified by the proof

- of a prior lien, unless the executions creating it were actually levied.—*ib.* 147
5. The sheriff is competent to execute a decree for the sale of mortgaged premises, upon the foreclosure of the mortgagor's equity of redemption, and the decree need not require a return of the proceedings thereon to the court. — *Mussina vs. Bartlett*..... 278

SIGNATURE.

1. Where one signs his name to a blank piece of paper, with intent that it shall be filled up, as a note or endorsement, he is liable on the same, although the person intrusted with it, shall violate the confidence reposed in him, by filling it up with another sum, or using it for another purpose, than the one intended.—*Roberts vs. Adams*... 297
2. Such a blank is a letter of credit, to any amount which the person to whom the same is confided, may choose to insert in it.—*ib.* 297
3. And if such a blank be obtained by a firm, when in existence, and be filled up by one of the partners, after its dissolution, each partner will be liable to reimburse the moneys paid by the signer or indorser in blank to the holder.—*ib.* 297
4. Where one lends his name on an instrument in blank, to partners, as their security, and by the negligence of one partner, and the fraud of the other, the lender is compelled to pay the sum inserted in the blank instrument—he is entitled to reimbursement from either of the partners. *ib.*..... 297
5. *It seems*, however, that if a blank be entrusted to one for the purpose of inserting a limited sum in it, or to be used for a particular purpose, and it be filled up with a larger sum, or used for a different purpose, than that contemplated by the signer or endorser of the blank, and the facts be traced to the knowledge of plaintiff, at the time he acquires possession of the instrument, it will prevent a recovery.—*ib.* 297

SLANDER.

1. Where a scandalous imputation affects the accused in his office, profession or business, an action of slander will lie, without averring special damage.—*Johnson vs. Robertson & wife*..... 486
2. Saying of a physician, "he has killed the child by giving it too much calomel," is actionable.—*ib.*..... 486

3. To charge a person with having killed another, without explaining or limiting the words, imports an accusation of murder, and is actionable.—*ib.*..... 486
4. Where words are actionable in themselves, the law implies damage, and the action is allowed, not only to compensate for pecuniary loss, but to afford redress for wounded feelings and prostrate reputation.—*ib.*..... 486
5. Where words are actionable in themselves, it is not necessary to lay special damages, and no evidence of special damage can be received, unless specially averred.—*ib.*.... 486
6. An averment, that certain persons, who are named, "*and divers other persons* would otherwise have employed the plaintiff," is not sufficient to authorise proof of special damages, by others than those specially named.—*ib.*.... 486
7. Though a plaintiff may enhance damages by proof of special damages, it does not follow, that the jury are confined, in estimating the damages, to the pecuniary loss proved; they may compensate the injured party, taking into consideration not only his pecuniary loss, but all the circumstances of the case.—*ib.*..... 486
8. A witness cannot be asked in slander, if he knows of other persons refusing to employ plaintiff, by reason of the slanderous words spoken,—than those mentioned in the declaration..... 486

SLAVE.

1. A contract for the sale or hire of a slave, is governed as far as the nature of the subject will allow, by the same principles that govern other contracts of sale.—*Rix, adm'r vs. Dillahunt*..... 134
2. The hirer of a slave, for a definite period, becomes a purchaser, for the time agreed on, and if the slave die before its expiration, the loss must be borne by the hirer, and he cannot resist a recovery, by shewing that the act of God prevented him from deriving a profit from the contract, unless, by its terms, it provides for such a contingency.—*ib.*..... 134
3. It seems, however, that in Virginia and South Carolina, the owner is not entitled to recover hire, for the time intervening between the death of the slave, and the expiration of the term for which he was hired, but the hire must be apportioned.—*ib.*..... 134
4. Where one warrants a slave to be sound which was not so—but who afterwards recovered and became sound—the measure of damages, is the sum paid for medical at-

- tendance, nursing, &c., which induced the recovery.—
Hogan vs. Thorington..... 428
5. The fact that a slave, given by a parent to a child, remains at the residence of the donor, may be explained by the circumstance, that the residence of the donor, is also that of the donee.—*Sims vs. The adm'r of Sims*..... 449
6. And is a proper subject for the consideration of a jury, when enquiring into the truth and reality of the gift.—*ib.* 449
7. Where a defendant assisted in secreting a slave, to the end that she might escape from her master, and obtain her freedom, but there was no intention to convert the property to the use of the defendant—an indictment for larceny could not be sustained.—*The State vs. Hawkins*. 461

STATUTE.

1. Statutes, appointing the times for courts to be holden, are public acts, and will be judicially taken notice of.—*Administrators of Weatherford vs. Weatherford*..... 171
2. A statute, where no time is fixed for the commencement of its operation, takes effect from its passage.—*ib.*..... 171
3. Where the legislature passed a statute on the twenty-second December, eighteen hundred and thirty-six, requiring the courts of a particular circuit to be holden at a particular time; and on the twenty-third December, eighteen hundred and thirty six, enacted a statute upon the same subject, providing that the act should not take effect until the first day of August after its passage: it was held—
 - 1st. That the passage of the last statute did not repeal that of twenty-second December.
 - 2d. That, though one of the courts of the circuit was not provided for, in the act of the 22d December, yet the omission could not influence, as the court so omitted, should be holden at the time appointed by the pre-existing law, though it should conflict with some other court in the circuit: in which event, the judge appointed to the circuit, should call to his aid another judge.—*ib.*..... 171
4. A statute imposing a penalty, must be strictly construed, and closely followed, and the form of procedure, and the measure or description of proof prescribed, must be regarded.—*Bettis, adm'r vs. Taylor*..... 564
5. *It seems*, that a party pursuing a summary remedy given by statute, must conform strictly to the terms of the act, and the conformity must be shewn by the record.—*ib.*... 564

SUMMARY PROCEEDINGS.

1. In a summary proceeding on a bank notice, every thing necessary to give the court jurisdiction, and to sustain its judgment must appear on the record.—*Bates vs. The Planters' & Merchants' Bank*..... 99
2. And where the record does not show that the certificate of the President of the Bank was produced and shewn to the court—it has no jurisdiction, and judgment can not be rendered.—*ib.*..... 99
3. Such certificate, appended to a notice to defendant attached to the transcript, is no part of the record—no action of the court appearing to have been had on it.—*ib.*..... 99
4. The charter of the Planters' and Merchants' Bank of Mobile, does not give the right to the bank to recover on notes or bills held by them, unless such notes and bills are made negotiable and payable at that particular bank. *Levert vs. The Planters' and Merchants' Bank*..... 104
5. And in such cases the record must shew that the note or bill, on which the remedy is sought, was made payable and negotiable at the bank.—*ib.*..... 104
6. The notice issued to defendant, and attached to the transcript, is not considered as part of the record,—so as to shew the right of the bank to recover judgment on motion.—*ib.*..... 104
7. The act of the thirtieth June, eighteen hundred and thirty-seven, gives the remedy by motion, to the bank, only on notes and bills, the future acquisition of the banks.—*ib.*..... 104
8. The remedy by motion being in derogation of the common law, cannot be inferred unless the party claiming the benefit of it, shews affirmatively that he is entitled to it. *ib.*..... 104
9. The bank cannot, as endorsee of defendant, maintain a proceeding against one (not the maker) as the endorser of a note, made payable to the order of the maker.—*Lea & Langdon vs. The Branch Bank at Mobile*..... 119
10. And the certificate of the President of the Bank, that the paper sued on, is really and *bona fide*, the property of the Bank, will not, of itself, give title to the Bank, of the paper sued on.—*ib.*..... 119
11. The legislature, in requiring such certificate, did not intend a grant of power—only a limitation on a power already given.—*ib.*..... 119
12. *It seems*, that a party pursuing a summary remedy given by statute, must conform strictly to the terms of the

- act, and the conformity must be shewn by the record.--
Beltis, adm'r, vs. Taylor..... 564
- 13 Also, that in such cases, when submitted to a jury, on an issue, essential facts will either be intended to exist, or will be considered waived--if the record shew such a compliance with the statute, as is necessary to give the court jurisdiction.--*ib.*..... 564

SURETY.

1. Where a creditor, without the consent of a surety, makes a valid agreement, with the principal debtor, to prolong the time of payment, the surety will be discharged.--*Inge vs. The Branch Bank of Mobile*..... 108
2. The statute authorising summary proceedings by the banks, in collecting claims due them, requires the court to empanel a jury to try the issue, where the claim is contested.--*Curry vs. The Bank of Mobile*..... 360
3. In cases where bank debtors are proceeded against summarily by notice, the judgment, whether by default or otherwise, must shew affirmatively, every fact necessary to give the court jurisdiction; and in judgments by default, the liability of the defendant for the debt must be also shewn.--*ib.*..... 361
4. But where an issue is made up, the verdict ascertains the defendant's liability, as in other cases.--*ib.*..... 361
5. A notice in writing, which so far identifies the debt for which judgment will be moved, as to afford reasonable certainty, is sufficient.--*ib.*..... 361
6. A corporation can do an act *in pais*, by an attorney in fact; and so an attorney acting on behalf of a bank, may give the notice to a bank debtor, required by statute, previous to a motion for judgment.--*ib.*..... 361
7. And such notice need not be under the seal of the corporation.--*ib.*..... 362
8. The ancient rule applied to corporations existing by the common law, that they could only act by their common seal has no application to corporations created by statute.--*ib.*..... 362

SURVEY, PLAN OF.

1. A plat or plan of survey may be referred to in a grant, and become part of it; showing the proper lines and ascertaining the localities.--*Hogan vs. Campbell & Cleave-land*..... 10

TENANT.

1. Where one rents land, for the purpose of making a crop, upon the condition that he is to give up possession in case the owner sells to a third person, before the crop is made—it is not competent for the tenant, in case a sale is made, to object that the contract of sale is not evidenced by a deed conveying a perfect title.—*Dean vs. Fail*... 491
2. A tenant who has enjoyed the possession of land, without interruption, for the entire period of his lease, cannot be allowed to avoid the payment of rent, by shewing a defect of title in his landlord.—*Terry vs. Ferguson, adm'r*... 500
3. Nor can a tenant, in ejectment, be permitted to shew that his landlord had no title at the time of making the lease—though, perhaps he may prove that his landlord's title has since that time expired.—*ib.*... 500
4. Where one accepted a lease from an administrator, and undertook to pay him rent, he was not allowed to object a want of title in the administrator.—*ib.*... 500
5. An administrator is not required to exercise a control over the real estate of his intestate,—yet, if he assume to lease it, he will hold the rent in trust for those legally entitled.—*ib.*... 500

TITLE, DEFECT OF.

1. A tenant, who has enjoyed the possession of land, without interruption, for the entire period of his lease, cannot be allowed to avoid the payment of rent, by shewing a defect of title in his landlord.—*Terry vs. Ferguson, adm'r*. 500
2. A purchaser cannot resist the payment of the purchase money, for defects in the vendor's title, when he has taken possession of, and remains in the quiet enjoyment of the premises.—*ib.*... 500
3. Nor can a tenant, in ejectment, be permitted to shew that his landlord had no title at the time of making the lease, though perhaps he may prove that his landlord's title has, since that time, expired.—*ib.*... 500
4. And the purchaser of a personal chattel has been inhibited, while holding possession, from resisting the payment of the purchase money, by alleging a want of title in his vendor.—*ib.*... 500
5. Where one accepted a lease from an administrator, and undertook to pay him rent, he was not allowed to object a want of title in the administrator.—*ib.*... 500

TITLE OUTSTANDING.

1. A defendant in trover, may defend himself, by shewing title in a third person, and so also may a defendant in detinue.—*Dozier vs. Joyce*..... 303
2. But a mere trespasser cannot set up an outstanding title in a third person, without connecting himself with it.—*ib.*..... 304

TRESPASS.

1. An action of trespass proper, does not survive against the representative of the wrong doer, where commenced in his life time ; and in such case the representatives cannot make themselves parties to the suit.—*Nettles, adm'r vs. Barnett* 181

TRESPASS TO TRY TITLES.

1. By the act of eighteen hundred and twenty-one, abolishing the fictitious proceedings in ejectment, and substituting the action of trespass—the laws in force in relation to the action of ejectment, except so far as it related to the fictitious proceedings, were declared to be applicable to the action of trespass to try titles.—*Sturdevant vs. The Heirs of Murrell*..... 317
2. But the English practice in relation to ejectment, has not been adopted in this State.—*ib.*..... 317
3. The declaration, in trespass to try title, should describe the land in controversy, with so much particularity and precision, as will inform the defendant what he is to defend against, and the court for what it is to render judgment.—*ib.*..... 317
4. Where one pleads “not guilty” to an action of trespass to try title, he is foreclosed from availing himself of an objection to the declaration ; but may, in error, insist upon the insufficiency of the verdict and judgment.—*ib.*... 317
5. A verdict and judgment not specifying the lands, found illegally in a party's occupancy, with such certainty as will show where they lie, or the number of acres and extent of lines—will not be sustained.—*ib.*..... 317
6. In trespass to try title, the plaintiff need only endorse on his writ, “that the action is brought as well to try titles, as to recover damages”—any unnecessary description of the premises, or of the injury committed, is regarded as surplusage.—*James vs. Tait et al.*..... 476
7. Where the verdict responds to the issue, and judgment is rendered for the land described in the declaration—it is

sufficient; and the use of the word "*tenement*," in addition to the description of the lands, does not vitiate the judgment.—*ib* 476

TRESPASS QUARE CLAUSUM FREGIT.

1. Trespass *quare clausum fregit*, will lie to recover possession of lands, and a writ of possession is properly awarded to the successful plaintiff.—*James vs. Tait et al*..... 476

TROVER.

1. A citizen does not lose the right to reclaim property taken from him, in times of public emergence, when the necessity which induced its seizure has passed away.—*Fryer vs. McRae*..... 187
2. And until his consent to part with it is freely given, he is to be considered its rightful owner, until time shall have divested his right of property.—*ib*..... 187
3. Therefore, where a horse had been seized under pretence of necessity for the public service, and was refused to be delivered on demand made, after the exigence which induced the seizure had passed—it was held that trover would lie for his recovery.—*ib*..... 187
4. The wrongful taking or detention of a personal chattel or other illegal assumption of ownership, or using or misusing of it, amount to a conversion.—*Gray vs. Croche-ron*..... 191
5. So, a temporary conversion will make a defendant liable, as, if one ride a horse, or control the services of another's slave, though he afterwards restore them to the true owner—the cause of action, which was once perfect, still remains, and the restoration will only go in mitigation of damages.—*ib*..... 191
6. If a slave be lost, during the time he is employed by a defendant, without the owner's consent, defendant is liable in trover, to the full value of the slave.—*ib*..... 191
7. But if the employment be at an end when the slave is lost, defendant will only be liable for the temporary conversion, and the measure of damages, instead of being the value of the slave, will be the injury resulting to the plaintiff, from the employment, which under some circumstances, may possibly be increased.—*ib*..... 191
8. A defendant in trover, may defend himself, by shewing title in a third person, and so also may a defendant in detinue.—*Dozier vs. Joyce*..... 303
9. An action of trover cannot be commenced by attachment;

- which can only issue on a money demand.—*Marshall & McLeod vs. White*..... 551
10. Where an attachment issues on affidavit of a money demand, a declaration subsequently filed in trover, against a defendant who does not appear, cannot be allowed.—*ib*..... 551
11. But if defendant appear and plead to the merits, he will be too late to review the irregularity after judgment.—*ib*..... 551

TRUSTS.

1. There is a broad and clearly defined distinction between trusts of property, which are specific in their nature, and trusts of money, which have no earmarks by which they can be identified.—*Maury's adm'r vs. Mason's adm'r*.. 211
2. But there is no difference between a trust created by the deposit of money in the first instance, and one where the money is raised by the sale or conversion of a chattel deposited with a trustee, to convert into money.—*ib*.. 211
3. Whenever the subject matter of a trust can be sued for at law, the statute of limitations may be insisted on as a bar, although the remedy is pursued in a court of equity.—*ib*..... 211
4. The only trusts not within the operation of the statute, are those which are peculiarly and exclusively, the subjects of equity jurisdiction.—*ib*..... 211
5. A subsisting recognised and acknowledged trust, as between the trustee and the *cestui que trust*, is not barred by the statute of limitation.—*ib*..... 211
6. If specific property is placed in the possession of any one in trust for a specific purpose, as long as it remains in specie, and capable of identification, it is considered as held subject to the trust, until such time as the trustee shall do some act evincing his intention to convert it to his own use, or to renounce or abandon the trust confided to him; and in all such cases, between the trustee and *cestui que trust*, such intention must be known or communicated to the trustee, otherwise the property will be considered as remaining subject to the trust.—*ib*..... 211
7. But this rule has never been applied to mere money trusts, when the fund has not been kept distinct and separate from other funds belonging to the trustee.—*ib*..... 211
8. The fact that action can be maintained for money received on one of numerous demands, does not revive all previous causes of action, and the payment of one claim cannot be construed as an admission of another.—*ib*.... 212

9. If, at the time of a testator's death, there is any specific personal property, in his hands belonging to others, which he holds in trust, or otherwise, *and it can be clearly traced and distinguished from the testator's own*, such property is not assets to be applied to the payment of his debts, or to be distributed among his heirs, but it is to be held as the testator himself held it.—*ib.* 212
10. But if the testator has *money, or other property*, in his hands belonging to others, which is in trust or otherwise, and it has no earmarks, and is not distinguishable from the mass of his own property, the party must come in as a general creditor.—*ib.* 212
11. And the rule above stated, as governing cases where the trustee is dead, extends with all its force, to money trusts where the testator is living.—*ib.* 212
12. As long as the trustee holds it capable of being distinguished as a separate fund distinct from his own money, the trust will be presumed to exist, from the circumstance that it is thus kept distinct, for this could alone be the case where the trust was recognised and admitted.—*ib.* 212
13. But if the trustee receives money on account of the subject matter of the trust, and does not separate it and keep it so that it can be identified, a continual conversion is constantly taking place, and if the *cestui que trust* lies by for more than six years, or such other time as will create a statutory bar, the presumption of payment will arise, as in any other case of a mere money demand, and the *onus* is thrown on the party claiming the money, to repel the presumption, as in other cases...*ib.* 212

VERDICT.

1. Verdicts formally returned may be corrected at the time, at the instance of the party injured, or if returned in consequence of instructions of the court—a bill of exceptions may be entered, and the decision thus examined.—*Patterson et al. vs. Cook.* 66
2. If the jury mistake the law, a motion to set aside the verdict, and for a new trial, is the remedy.—*ib.* 66
3. It is sufficient if the verdict respond to the issue framed; it is not necessary to pursue the very words...*ib.* 66
4. If the point in issue can be ascertained by the verdict, it is the duty of the court to mould it into proper form. *ib.* 66
5. The non-suits, (two of which equal a verdict,) embraced in the statute of eighteen hundred and seven, (Aik. Dig.

- 283, s. 135, must be such as continue to the end of the term.—*Kennedy vs. Geddes & Co.*..... 263
6. Thus, two non-suits taken in a cause, at different terms, each of which is set aside before the end of the term, are not equal to a verdict.—*ib.*..... 263
7. A verdict and judgment not specifying the lands, found illegally in a party's occupancy, with such certainty as will show where they lie, or the number of acres and extent of lines—will not be sustained.—*Sturdevant vs. The Heirs of Murrell*..... 317
8. Where the verdict responds to the issue, and judgment is rendered for the land described in the declaration—it is sufficient; and the use of the word "*tenement*," in addition to the description of the lands, does not vitiate the judgment.—*James vs. Tait et al.*..... 476

WARRANTY.

1. The seller of personal chattels impliedly stipulates that the article sold is his own, and that he will indemnify the buyer for the loss, if the title is in another person.—*Ricks, adm'r vs. Dillahunty*..... 133
2. But a sale by an executor, administrator, or other trustee, forms an exception to the rule, and does not imply a warranty of title, unless there be fraud, or perhaps, in some instances, gross negligence.—*ib.*..... 133
3. To entitle the purchaser to recover for any defect in the quality or soundness of the article or property sold, except under special circumstances, he must prove that the seller warranted the thing sold to be good and sound, or that he concealed or fraudulently represented its qualities.—*ib.* 133
4. If the warranty be express, it will extend to all defects, whether known or unknown, to the seller, unless they be such as a common purchaser might have observed, at the time of the sale.—*ib.*..... 133
5. No particular form of expression is required to constitute a warranty. It generally depends upon the terms, and the sense in which they are understood by the parties, whether they amount to a warranty, or were a mere expression of the seller's opinion.—*ib.*..... 133
6. It is not necessary for the indemnity of the purchaser, that he should in all cases, require an express warranty, as in some cases the law will imply it: as in case of one who sells provisions—a merchant abroad, who fills an order for his customer, and one who sells by sample... *ib.* 134
7. A mere representation or expression of opinion, will not render the seller liable, unless made with a knowledge that they are false.—*ib.*..... 134

8. The purchaser of personal property cannot defend against the purchase money, by showing that the property was of no value,—the seller making no warranty, and practising no fraud.—*ib.*..... 134
9. A suppression of the truth, also, to the buyer's prejudice, will render the seller liable.—*ib.*..... 134
10. A contract for the sale or hire of a slave, is governed as far as the nature of the subject will allow, by the same principles that govern other contracts of sale.—*ib.*..... 134
11. The hirer of a slave for a definite period, becomes a purchaser, for the time agreed on, and if the slave die before its expiration, the loss must be borne by the hirer, and he cannot resist a recovery, by shewing that the act of God prevented him from deriving a profit from the contract, unless, by its terms, it provides for such a contingency.—*ib.*..... 134
12. It seems, however, that in Virginia and South Carolina, the owner is not entitled to recover hire, for the time intervening between the death of the slave, and the expiration of the term for which he was hired, but the hire must be apportioned.—*ib.*..... 134
13. In South Carolina, a sound price, contrary to the English common law, implies a warranty of soundness, by the seller of a personal chattel....*ib.*..... 134
14. The action for a false warranty is intended not so much to punish the seller, as to compensate the purchaser for any injury he may have sustained.—*Hogan vs. Thornton*..... 428
15. And in such cases, the measure of damages is the injury sustained by plaintiff, in consequence of a false warranty.—*ib.*..... 428
16. Where one warrants a slave to be sound which was not so—but who afterwards recovered and became sound—the measure of damages, is the sum paid for medical attendance, nursing, &c., which induced the recovery.—*ib.*..... 428

WHARF.—(See *Riparian Rights*.)

WILL.

1. In adjusting the meaning of any of the provisions of a will, the testator's intention is allowed to exert a controlling influence—if that be clear, and not contrary to law, it must prevail, although in giving effect to it, some words should be rejected, or so restrained in their appli-

- cation, as to change their literal meaning.—*Heirs of Capital vs. McMillan, adm'r.*..... 197
2. Where the testator's intention would be advanced, courts have sometimes taken license not only to reject, but even to supply words—*ib.*..... 197
 3. If a *will* be ambiguous in any particular part, the whole *will* may be considered, for the purpose of ascertaining the testator's intent in that part.—*ib.*..... 197
 4. As the property devised or bequeathed to infant devisees, legatees, most usually goes into the possession of their guardians, after the executor shall have collected the estate of the testator, and paid his debts; in order to allow it to remain with the the executor, or to receive any other than its accustomed destination, the intention of the testator should appear from plain language, or clear implication.—*ib.*..... 197
 5. In the construction of powers as well as wills, the intention of the parties, if compatible with law, governs the court.—*ib.*..... 197
 6. In general, the intention is to be collected from the instrument creating the power; though a reference is sometimes allowable to the circumstances under which the power was given.—*ib.*..... 197
 7. But where two intentions appear, a general and a particular one, such a construction shall be given to the power, that the general intention shall take effect, even if the particular intent be defeated.—*ib.*..... 197
 8. Where a studied regard to accuracy and precision of language in a *will*, is not discovered—the sense in which the testator employed terms, and the meaning he affixed to them, must be ascertained in determining his intention... *ib.*..... 197
 9. The words of a testator are to be taken in their *ordinary* meaning, and not in their *technical* sense.—*ib.*..... 197
 10. Where property is left by a testator to his minor children, to be given them when they respectively arrive at the age of twenty-one years, or marry, and to be managed by his widow, during her widowhood. the control of the property by the widow, ceases upon her marriage: and the right to the possession and control of the property, vests in the guardian of the minors... *ib.*..... 198
 11. A decision on the probate of a will, is a judicial proceeding, and the court in which it is registered, is a court of record, and if the presiding judge is also clerk of the court, he has authority to test the records of his court in both capacities.—*Dozier vs. Joyce.*..... 303

12. In the construction of wills, the controlling rule is, that the court must, if practicable, ascertain the meaning of the testator.—*Leavens vs. Butler, et ux.*..... 380
13. In the exposition of a will, every part must be consulted; each word is to have its effect, if it be possible, without thwarting the general intent.—*ib.*..... 380
14. A codicil is a part of a will, and is to be construed with it; and may, as a context, confirm, vary, or altogether change an intention expressed in the body of the will.—*ib.*..... 380
15. Neither the common or statute law give to an executor *virtute officii*, a right to the possession of the testator's lands—if they are devised, they pass by the will to the devisee, who has a right to entry and possession; if undevised, they descend to the heir, who is entitled to possession...*ib.*..... 380
16. Where power is given by a will to sell lands, it does not require, in order to its validity, the co-operation of all the executors named—the power is attached to the office, and one executor, who has alone qualified, possesses all the power conferred by the will.—*ib.*..... 380
17. Where a testator intends that the payment of legacies shall be expedited or delayed—his intention must be followed as nearly as possible.—*ib.*..... 380
18. Payment of debts takes precedence of legacies, and a legacy will not, in general, be paid, where the assets will be required to pay debts.—*ib.*..... 380
19. But, in case of a contingent debt, a legatee will be entitled to the assets, on giving security to refund,—if the debt become absolute.—*ib.*..... 380
20. Where it is obvious that it will be necessary for a legatee to refund, in order to pay debts; or where the will postpones the payment of the legacy to a distant time; or if the payment would defeat the testator's intention—the legatee cannot claim it.—*ib.*..... 381
21. According to the English practice, where a will relates to lands only, it ought not to be proved in the spiritual court—but if it embraces personal property also, it ought to be proved there...*ib.*..... 381
22. Where one by his will, appointed certain agents to make a division of his personal estate, and in case of the death of either of them, authorised the survivor to appoint others in the place of those deceased, to assist in making the division—a recital contained in a paper, purporting to be the evidence of such division, and made by agents purporting to have been appointed by the survivor, is not

sufficient evidence of the fact of the appointment. Proof of the fact against one not claiming under the paper, purporting to be a division, must be made by evidence *alibunde*.—*Mordecai vs. Beal*..... 529

WITNESS.

1. If a witness whose deposition has been taken on the ground of his being about to leave the State, remain until the trial of the cause—his deposition cannot be read in evidence. *Goodwyn vs. Lloyd*..... 237
2. But the failure on the part of a witness, thus situated, to put his determination of leaving the State, into execution, until after a term of the court has elapsed, will not deprive the party of the benefit of his testimony, if he leaves the State before the trial of the cause.—*ib*..... 237
3. And his death, within the State, before he executes his determination of leaving it, affords as good ground for using his testimony, as his absence from the State, at the time of the trial.—*ib*..... 237
4. A witness cannot be examined to any distinct collateral fact, for the purpose of impeaching his testimony afterwards: But if the witness voluntarily swears falsely in relation to matters not within the issue, he may be impeached by contradicting him.—*Dozier vs. Joyce*..... 303
5. A witness cannot be asked in slander, if he knows of other persons refusing to employ plaintiff, by reason of the slanderous words spoken,—than those mentioned in the declaration.—*Johnson vs. Robertson & wife*..... 486
6. Where the subscribing witness handed a bond to the clerk, who copied it—the copy made by the clerk, is satisfactory evidence of the contents of the original.—*Evans et al. vs. Bolling*..... 546
7. But the subscribing witness cannot be allowed to refresh his memory, as to the contents of the lost bond, by reference to the copy made by the clerk.—*ib*..... 546
8. A witness, *it seems*, may be allowed to refresh his memory, by looking at a memorandum he made at the time the occurrence took place, to which he is called to testify; but must swear, not from the fact of his having written it down, but to the fact itself.—*ib*..... 546

WARDS.

1. In adjusting the meaning of any of the provisions of a will, the testator's intention is allowed to exert a controlling influence—if that be clear, and not contrary to law, it must prevail, although in giving effect to it, some words

- should be rejected, or so restrained in their application as to change their literal meaning.—*Heirs of Capal vs. McMillan, adm'r*..... 197
2. Where the testator's intention would be advanced, courts have sometimes taken license not only to reject, but even to supply words—*ib.*..... 197
 3. Where a studied regard to accuracy and precision of language in a *will*, is not discovered—the sense in which the testator employed terms, and the meaning he affixed to them, must be ascertained in determining his intention...*ib.*..... 197
 4. The words of a testator are to be taken in their *ordinary* meaning, and not in their *technical* sense.—*ib.*..... 198

WORK AND LABOR.

1. If a party undertake to do work by a fixed time, or in a particular manner, but fails to perform it within the time, or according to the manner agreed; he cannot recover on the special contract... *Gazzam vs. Kirby*..... 253
2. But, if the work done, was of value to the defendant, plaintiff may recover on a *quantum meruit*.—*ib.*..... 253
3. If the work be so illy executed, as to be of no benefit to the defendant, the plaintiff is not entitled to recover any thing; not even for materials furnished.—*ib.*..... 253
4. If the work performed is of less value to a defendant, when completed, after a stipulated time, than it would have been, had the contract been performed with punctuality,—it is competent for him to reduce the recovery by shewing that fact...*ib.*..... 253
5. And, in such a case, the contract is good evidence to shew what estimate the parties originally placed on the work.—*ib.*..... 253

WRIT.

1. Where the place of holding court is left blank in a writ, and the defect is in no way cured by appearance or otherwise—judgment cannot be rendered for plaintiff.—*Wragg vs. The Branch Bank of Alabama at Mobile*..... 195
2. A written acknowledgment of service of a writ by a defendant, without proof of such acknowledgment, is not sufficient to sustain a judgment by default.—*Hobson & Sons vs. Emanuel et al.*..... 442
3. But where parties appear in court, the necessity of the actual service of process is dispensed with.—*ib.*..... 442
4. Process must be construed in reference to the law which

- provides for its issuance and return.—*Findley et al. vs. Ritchie*..... 452
5. The act of eighteen hundred and seven, (Aikin's Digest, 278,) provides that where a writ is issued five days before court, it is regularly returnable to the next term; and it makes a writ abateable, if it be returnable at a term beyond that next to be holden.—*ib*..... 452
6. A writ issued on the third of January, eighteen hundred and thirty-eight, and returnable on the fourth Monday in January *next*, is not illegal; and the word *next*, in the writ, may refer to the *fourth Monday next after its date*, and not to January, eighteen hundred and thirty-nine.—*ib*..... 452
7. A return of "*not found*," to a writ, does not authorise the inference, that the suit is abandoned by the plaintiff.—*Gaston vs. Parsons*..... 469
8. A plea in abatement that a suit was pending for the identical cause of action, at the time of the issuance of the writ, is supported by the production of the record; and the replication to such a plea, should present the issue of *nul tiel record*.—*ib*..... 469
9. A writ, as part of the record, is proper and pertinent evidence to support such a plea, on an issue of *nul tiel record*.—*ib*..... 469
10. An objection to an endorsement on a writ cannot be entertained after the plea of not guilty.—*James vs. Tait et al*..... 476

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